

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOSEPH TRANCHINA, *

Plaintiff, *

-v- 17-cv-1256 *

C.O. JUSTIN McGRATH, et al., *

Defendants. *

TRANSCRIPT OF TRIAL TESTIMONY
BEFORE THE HONORABLE MAE A. D'AGOSTINO
August 20 & 21, 2020
445 Broadway, Albany, New York

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1 (Held out of presence of jury)

2 THE COURT: Britney advised me, Mr. Miranda,
3 that you have some issues?

4 MR. MIRANDA: Thank you, your Honor. On
5 August 4th we subpoenaed Lieutenant Jerome Laramay. He
6 was served on August 8th. He is not showing up today.
7 I don't think we could take him today anyway. So we
8 haven't been able to start our proof yet, and he's not
9 going to be showing up tomorrow. He did indicate that
10 he may be able to come on Monday; however, we're very
11 aware that the Court is trying to move this along as
12 quickly as possible. We have deposed him in this
13 matter.

14 From our prospective, we believe he is
15 unavailable because he is not showing up. He's not
16 going to show up tomorrow. So we would offer his
17 deposition transcript in, if we could read portions of
18 that to the jury when we have our proof.

19 THE COURT: All right. I will deal with that
20 in just a little bit. I'd like to get going with the
21 testimony. Would you bring the jury in, please.

22 COURT CLERK: Yes, Judge.

23 (Jurors present)

24 THE COURT: Plaintiff may call their next
25 witness. Good morning, folks. Thank you for being here

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~~BARNABY - DIRECT - ROCHE~~

1 right on time.

2 MR. ROCHE: Good morning, your Honor.

3 Plaintiff calls Matthew Barnaby.

4 COURT CLERK: Mr. Barnaby, would you please
5 raise your right hand and state your full name for the
6 record please.

7 THE WITNESS: Matthew Barnaby.

8 M A T T H E W B A R N A B Y , having been duly sworn,
9 was examined and testified as follows:

10 MR. ROCHE: May I inquire, your Honor?

11 THE COURT: Yes, you may.

12 MR. ROCHE: Thank you.

13 DIRECT EXAMINATION

14 BY MR. ROCHE:

15 Q Good morning.

16 A Good morning.

17 Q Is it Sergeant Barnaby or --

18 A Yes, sergeant.

19 Q Okay. So, Sergeant Barnaby, were you the annex
20 school sergeant on the morning of January 28th, 2016, at
21 Bare Hill Correctional Facility?

22 A Yes.

23 Q And did that mean that you were in charge of the
24 annex area on that day?

25 A Yes.

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1 Q So you were in charge of all of the corrections
2 officers working in that area on that morning. Correct?

3 A Yes.

4 Q As a sergeant, it's fair to say part of your
5 uniform is a white shirt, right?

6 A Yes.

7 Q And you were wearing a white shirt that day.
8 Correct?

9 A Yes.

10 Q Currently the only officers that wear white shirts
11 are sergeants, lieutenants and above. Correct?

12 A Yes.

13 Q The regular corrections officers all wear blue
14 shirts, right?

15 A Yes.

16 Q All right. Directing your attention to that
17 morning of January 28, 2016. Did you receive a radio
18 call from the school annex sometime after 8:00 A.M. in
19 the morning?

20 A Yes.

21 Q Okay. And was that -- that call was for unit 9, 11
22 and 12. Right?

23 A Correct.

24 Q And number 9, that would be you?

25 A Yes.

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1 Q So number 9 was the sergeant number that you were
2 assigned to that day?

3 A Yes.

4 Q Okay. And 11 and 12, who were they?

5 A They were roundsmen correction officers.

6 Q What are roundsmen?

7 A They are correction officers that -- their duties
8 are to confirm security checks throughout the entire
9 facility.

10 Q And those roundsmen were wearing blue shirts on
11 that day, correct?

12 A Yes.

13 Q So when you got that radio call at 8:00 A.M., there
14 was no siren that accompanied it. Right?

15 A No.

16 Q Okay. So if there was a siren to accompany it,
17 what would that indicate to you?

18 A Usually it's an alarm that triggered, just that an
19 officer needs immediate assistance.

20 Q Okay. So this was just a straight radio call,
21 right?

22 A Yes.

23 Q And the reason that you were specifically called
24 was that it would have been your assignment that day to
25 respond to any incident that happened in the annex

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1 school, correct?

2 A Correct.

3 Q Okay. What was is the chart log?

4 A The chart log?

5 Q Yeah. The chart assignment log?

6 A There's no logbook in the chart office.

7 Q Okay. But is it fair to say that the chart
8 sergeants maintain a log that indicates what officers
9 and what sergeants are performing? What functions?

10 A They are paper copies of the charts.

11 Q Okay. And so the chart log for that day would have
12 indicated that you were the sergeant for the annex area,
13 correct?

14 A As far as that goes, the lieutenant has the
15 sergeants' assignments, not the chart sergeant.

16 Q Okay. So when you received the radio call and --
17 you proceeded directly to the school annex, correct?

18 A Correct.

19 Q And how long did it take to get there?

20 A Between 35 and 45 seconds.

21 Q And when you arrived, were there other officers
22 there already?

23 A Yes.

24 Q Okay. And were there -- how many officers were
25 there when you arrived?

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1 A I do believe there was two other officers that were
2 inside the foyer before I arrived.

3 Q Okay. And did they arrive the same time as you or
4 did you -- did they arrive before you?

5 A Those two officers were there before me.

6 Q Were they already in the vestibule before you got
7 there?

8 A Yes.

9 Q Were there -- did any other white shirts respond to
10 the incident?

11 A Yes.

12 Q And how many other white shirts were there?

13 A I do believe two other.

14 Q Okay. Who were they?

15 A I don't know their names.

16 Q And who were the blue shirts that were there before
17 you?

18 A I don't know their names.

19 Q Did you recognize them? Did you recognize the blue
20 shirts?

21 A Just through my report. One of them was Officer
22 Rabideau. I don't recall who the other ones were.

23 Q And did the white shirts -- who were they?

24 A I don't know their names.

25 Q Okay. Did you recognize them?

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1 A They were sergeants that worked at Bare Hill, yes.

2 Q Okay. Since this incident, have you made any
3 efforts to try to find out who they were?

4 A No.

5 Q So did those two other officers that you say were
6 there, did they enter into the foyer area?

7 A They were inside before I was, yes.

8 Q They were inside the foyer area before you were?

9 A Yes.

10 Q Now, you testified at a deposition in this matter,
11 right?

12 A Correct.

13 Q And that was back in May of 2019, correct?

14 A I don't know the specific date.

15 THE COURT: Members of the jury, this is not
16 the first time that you have heard reference to a
17 deposition, so I want to tell you just so that you fully
18 understand. Some of the testimony in this case before
19 you is in the form of depositions, which have been
20 received in evidence.

21 A deposition is simply a procedure where the
22 attorneys for one side may question the witness or an
23 adversary party under oath before a court reporter prior
24 to trial. This is part of what we call pretrial
25 discovery.

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1 You may consider the testimony of a witness
2 given at a deposition according to the same standards
3 you would use to evaluate the testimony of a witness
4 given at trial.

5 Yesterday you did hear reference to
6 depositions, you're hearing it now, that's exactly what
7 it is. It's testimony given under oath prior to the
8 trial, and as I said, you may consider the testimony of
9 a witness given at a deposition according to the same
10 standards you would use to evaluate the testimony of a
11 witness given at trial. Go ahead.

12 MR. ROCHE: Thank you, your Honor.

13 BY MR. ROCHE:

14 Q So were you at your deposition -- were you asked
15 these questions and did you give these answers? Page
16 63, line 17:

17 "QUESTION: Putting aside normal protocol, do you
18 have a specific recollection of seeing any of the white
19 shirts there?

20 "ANSWER: I know there was other white shirts
21 there. I do not recall who they were.

22 "QUESTION: How many other white shirts did you see
23 there?

24 "ANSWER: I want to say two.

25 "QUESTION: Okay. Where did you see these other

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1 white shirts?

2 "ANSWER: They were standing outside of the
3 building.

4 "QUESTION: Did they ever enter the foyer?

5 "ANSWER: Not that I recall."

6 Were you asked those questions and give those
7 answers at your deposition?

8 A Yes.

9 Q Is it fair to say that at your deposition you
10 testified that you were the only white shirt to enter
11 the foyer? Correct?

12 A Yes.

13 Q Now, when you entered the foyer, was Mr. Tranchina
14 handcuffed?

15 A Yes.

16 Q Okay. And was he injured at that time?

17 A He was standing facing the corner. I did not see
18 any injuries when I entered.

19 Q Okay. Did you check him for any injuries?

20 A Not at that immediate time, no.

21 Q Did you notice anybody being injured at that time?

22 A Officer McGrath stated that he was in a use of
23 force and that his hand was injured.

24 Q And did you look at his hand?

25 A He showed me it, yes.

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1 Q And did you see injuries, like skin scraped off his
2 knuckles?

3 A Yes.

4 Q Did you have any concerns as to how he received
5 those injuries?

6 A At that time, no.

7 Q Did you do anything at all to examine whether
8 Mr. Tranchina had suffered any injuries?

9 A Not in the foyer, no.

10 Q Did you ask Officer McGrath how he had injured his
11 hand?

12 A I had asked him what had just happened.

13 Q Okay. And did you have any suspicions that he
14 might have suffered those injuries from punching
15 Mr. Tranchina?

16 A No.

17 Q Did you ask Mr. Tranchina if he would like any
18 medical attention?

19 A Not at that time in the foyer, no.

20 Q So you made the decision to transport him to SHU
21 rather than to the infirmary?

22 A Yes.

23 MR. ABEL: Your Honor, he's asking leading
24 questions. This is direct examination.

25 THE COURT: It is direct examination but of

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1 course this is an adverse party. So I'm going to allow
2 him to a certain extent.

3 BY MR. ROCHE:

4 Q Okay. So did you direct that Mr. Tranchina be
5 brought to the solitary housing unit?

6 A The special housing unit, yes.

7 Q And did you accompany him to the special housing
8 unit?

9 A Yes, I did the escort.

10 Q And when you say you did the escort, does that mean
11 you were in the van that transported him there?

12 A Yes.

13 Q And were other officers in the van too?

14 A One other officer.

15 Q Okay. And while he was at the special housing
16 unit -- he was at the special housing unit for a few
17 hours, right?

18 A I don't know the timeframe he was there.

19 Q Okay. But is fair to say that you were at the
20 special housing unit up until after the time that he was
21 examined by the nurse, correct?

22 A Yes.

23 Q So when you transported -- you say you transported
24 Mr. Tranchina to the SHU.

25 A I said I escorted.

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1 Q You escorted. Okay. So -- but you were in the van
2 with another officer. Who was the other officer that
3 was in the van?

4 A Officer Rabideau.

5 Q And when you -- so were you involved in placing
6 Mr. Tranchina into the van?

7 A No. The officer would have done that.

8 Q He would have placed him in the back of the van; is
9 that correct?

10 A Yes.

11 Q Okay. Then you and Officer Rabideau sat in the
12 front of the van?

13 A Yes.

14 Q So fair to say that from where Mr. Tranchina would
15 have been placed in the back of the van, he wouldn't
16 really be able to see who else was in the van? Would
17 that be fair to say?

18 A Yes.

19 Q So when you got to the SHU, did you speak to the
20 sergeant at the SHU and other officers at the SHU?

21 A There was no other sergeant present when I arrived.
22 Just the officers that were working the SHU that day.

23 Q Okay. And did you speak to the officers at the
24 SHU?

25 A Once the inmate -- Mr. Tranchina was brought into

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1 the admission room, I did speak to one of them.

2 Q Okay. And did you tell these officers that
3 Mr. Tranchina had been involved in a use-of-force
4 incident?

5 A Yes.

6 Q By Officer McGrath? With Officer McGrath?

7 A Just that he was involved in a use of force and a
8 strip frisk needed to be completed.

9 Q What were you wearing that day?

10 A My state-issue pants, my white sergeant shirt, my
11 state-issue coat. I believe that nylon, winter cap.

12 Q So you remember that you are wearing a coat on that
13 day?

14 A Yes.

15 Q Once again, at your deposition, were you asked this
16 question and did you give this answer? Page 12, line 7:

17 "QUESTION: Do you recall one way or the other
18 whether you were wearing your coat at the time that you
19 responded to this incident?

20 "ANSWER: I don't recall."

21 Did you give that -- were you asked that question?
22 Did you give that answer at your deposition?

23 A Yes.

24 Q So what were you wearing on your feet?

25 A Black Bates boots.

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1 Q What kind of boots are Bates boots?

2 A They're a boot that comes up about mid-shin, they
3 have a zipper on the outside, they tie.

4 Q Fair to call them military-style boots?

5 A I don't know. I never been in the military so I
6 don't know what style boots they were.

7 Q Okay. But for -- let's say for someone who is
8 never in the military, do these look like military-type
9 boots?

10 MR. ABEL: Objection, your Honor. Calls for
11 speculation.

12 THE COURT: Overruled. You may answer.

13 A I guess you could. I don't know fully.

14 BY MR. ROCHE:

15 Q What -- heavy boots, correct?

16 A No, the Bates are very light.

17 Q Okay. But they -- do they have a hard toe on them?

18 A No.

19 Q They have got thick soles?

20 A They have soles, yes.

21 Q Sergeant, is there ever a time that kicking an
22 inmate is an acceptable use of force?

23 A No.

24 Q And would you agree that kicking an inmate who's
25 restrained on the ground would be particularly

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1 unacceptable?

2 A Yes.

3 Q Sergeant, if you were to see another corrections
4 officer assault an inmate, would it be your duty to
5 intervene?

6 A Yes.

7 Q Sergeant, would it be fair to say that an officer
8 assigned to frisk duty should be wearing gloves while
9 performing those duties?

10 A That's at his discretion.

11 Q So it's totally up to the officer. That's your
12 testimony?

13 A Yes.

14 Q Now, when you arrived in the foyer of where this
15 incident occurred, did you see any gloves on the ground?

16 A I don't recall.

17 Q When you arrived in the foyer, was Officer McGrath
18 wearing any gloves?

19 A I don't recall.

20 Q So when you were deposed in this matter, were you
21 asked this question and did you give this answer? Page
22 79, line 3:

23 "QUESTION: Was he wearing gloves?

24 "ANSWER: When I arrived, I'm going to say no."

25 Were you asked that question and did you give that

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1 answer?

2 A Yes.

3 Q Now, would it be fair to say that your job -- part
4 of your job as the responding sergeant would be to make
5 sure that any evidence pertaining to the incident would
6 be properly secured?

7 A Yes.

8 Q So if there were gloves that were on the scene and
9 looked like they were involved in the incident, would
10 you secure those gloves?

11 A No.

12 Q Why not?

13 A It's not protocol to secure the used gloves.

14 Q You don't think the condition of the gloves could
15 be relevant to determining what happened during the
16 incident?

17 A No.

18 Q Okay. So -- but if one glove was totally ripped up
19 and the other glove was not, you don't think that there
20 would be any relevant information from a fact such as
21 that?

22 A No.

23 Q Did you observe Officer McGrath's hands?

24 A He showed me his one hand that was injured.

25 Q Okay. And fair to say he only had -- was only one

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1 hand that was injured, the other hand was totally fine?

2 A That I saw, yes.

3 Q Fair to say you didn't see any rock salt on the
4 carpet in the foyer?

5 A I'm not exactly sure what was on it. It was a
6 mixture of mud, dirt, and probably rock salt.

7 Q At your deposition, were you asked these questions
8 and did you give these answers:

9 "QUESTION: What was on the foyer?" Sorry. 42,
10 line 18.

11 "QUESTION: What was on the floor of the foyer?

12 "ANSWER: It was a carpet.

13 "QUESTION: Okay. Was it clean?

14 "ANSWER: I do not recall.

15 "QUESTION: Okay. Do you remember if there was
16 anything on the carpet?

17 "ANSWER: Given the time of year, I'm going to
18 assume there's probably mud and dirt.

19 "QUESTION: Okay. Anything else?

20 "ANSWER: Not that I recall. Not that I can
21 recall."

22 Were you asked those questions and did you give
23 those answers?

24 A Yes.

25 Q Okay. So does that refresh your recollection as to

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1 whether you saw any rock salt on the rug back on
2 January 28th?

3 A Mixed in with the dirt and everything else.

4 Q Is it fair to say that when you testified at your
5 deposition, you didn't say that you saw mud and dirt,
6 you said you assumed it would be there because of the
7 time of year. Wasn't that your testimony?

8 A Correct.

9 Q Okay. So is it fair to say that you -- you don't
10 recall seeing any rock salt or mud and dirt on the rug
11 at that time? Correct?

12 A At that time of year there would have been mud and
13 dirt.

14 Q You don't recall it, right?

15 A Specifically, right now, no.

16 Q When you were inside the foyer -- when you
17 responded to this incident and you were inside the
18 foyer, did you see a weapon?

19 A No.

20 Q So you saw in court yesterday when the weapon, the
21 shiv or knife that was -- Plexiglas knife that was
22 recovered, you saw that here in court, right?

23 A The picture of it, correct.

24 Q Yes. And when did you first see that knife?

25 A I saw a picture of it in the administration

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1 building.

2 Q And when was that?

3 A That afternoon of the incident.

4 Q So you never saw the actual Plexiglas item on that
5 particular day, right?

6 A No.

7 Q You have never seen it since either, right?

8 A No.

9 Q Now, did Officer McGrath tell you when you were in
10 the foyer that he recovered a weapon?

11 A Yes.

12 Q Okay. And did he in fact tell you that the type of
13 weapon he found was a ice stick-type weapon?

14 A Yes.

15 Q But he didn't show it to you, right?

16 A No.

17 Q So you -- so you didn't ask to see what it was that
18 you had recovered. Right?

19 A No.

20 Q Okay. So you -- as the responding sergeant, you
21 could have taken custody of that item to make sure it
22 was properly secured. Right?

23 A That is not protocol for our department.

24 Q Okay. Did Officer McGrath tell you where he had
25 the weapon while you were in the foyer?

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1 A He said he had secured it on his person.

2 Q Okay. Did he tell you he put it in his pocket?

3 A Just that it was secured on his person.

4 Q Would putting evidence of a crime in your pocket be
5 considered protocol in securing evidence?

6 A Yes.

7 Q And would it be protocol for the supervising
8 sergeant to ask to see the weapon at the location where
9 the officer was claiming that he found it prior to a use
10 of force?

11 A No.

12 Q From the foyer, Officer McGrath was required to go
13 to the infirmary, right?

14 A Correct.

15 Q Okay. And that's protocol, right?

16 A Yes.

17 Q In the use-of-force incident, the officer that used
18 the force are required to go to the infirmary right
19 after?

20 A Yes.

21 Q Okay. So if you were involved in the use of force,
22 even though you're a sergeant, you would be required to
23 go too. Right?

24 A Correct.

25 Q And it's also protocol that photographs must be

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1 taken of any officer that's been involved in the use of
2 force?

3 A Only if there's injuries to that officer.

4 Q But if there are injuries to the officer,
5 photographs must be taken of those injuries?

6 A Correct.

7 Q Correct? As the area sergeant, you were
8 responsible for making sure that the proper steps are
9 taken after use of force, right?

10 A Correct.

11 Q And one of those steps would be if the inmate had
12 been injured, proper step would be to make sure that the
13 inmate is brought to the infirmary. Correct?

14 A Not always to the infirmary, no.

15 Q But if an inmate had suffered significant injuries,
16 would it be fair to say he should be brought to the
17 infirmary, right?

18 A No. Medical observes them in the SHU also.

19 Q And medical did observe, a nurse was -- came to the
20 SHU and saw Mr. Tranchina, correct?

21 A Yes, at my request.

22 Q And once the nurse saw him, she immediately
23 directed that he be taken to an outside facility,
24 correct? An outside medical facility?

25 A I do believe she testified that she talked to her

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1 medical director and then they decided that he deemed to
2 have x-rays taken.

3 Q So it was directed that he be taken to a hospital
4 for x-rays of his face and ribs. Correct?

5 A Correct.

6 Q Is it fair to say that for a use-of-force incident,
7 the proper step to be ordered would be to videotape the
8 escort of the inmate from the scene of the incident to
9 the SHU, right?

10 A Not always, no.

11 Q Okay. But that is something that -- that is often
12 done?

13 A It could be done, yes.

14 Q And it would be particularly appropriate in a
15 situation where the inmate has been injured, correct?

16 A Not always, no.

17 Q Well, in what circumstance, then, would it be
18 appropriate for video of the escort of the inmate from
19 the incident to the SHU?

20 A Video escort is deemed by the lieutenant, the watch
21 commander. He would call and say he wants the escort
22 done on video.

23 Q Okay. And typically would that usually be ordered
24 in circumstances where the inmate has sustained
25 injuries?

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1 A Inmate, officer, could be either.

2 Q So it would be more likely that that would be
3 ordered in an incident where injury was caused. Right?

4 A If it's feasible.

5 Q That was not done in this case, right?

6 A No, it was not.

7 Q Did you ask -- who was the watch commander on that
8 day?

9 A I don't recall which lieutenant was on.

10 Q Was it Lieutenant Garvey?

11 A Very possible. I don't recall which one was on.

12 Q Okay. Did you consult with your lieutenant or
13 whoever the watch commander was to get advice as to
14 whether Mr. Tranchina's escort from the incident to the
15 SHU should be videotaped?

16 A I don't recall if I called him or not.

17 Q So would it be fair to say that as the supervisor
18 of that unit, it would be your job to determine what
19 happened in the use of force. Right?

20 A I collected the facts and got the statements from
21 both parties involved.

22 Q So you were involved in trying to get to the bottom
23 of whatever happened. Right?

24 A Correct.

25 Q In this case, did you determine how Mr. Tranchina

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1 suffered a fractured rib?

2 A Just by what Officer McGrath told me.

3 Q So you totally relied upon Officer McGrath told
4 you?

5 A Yes, because Inmate Tranchina would not make a
6 statement to me.

7 Q So is it fair to say that the only information that
8 you had was provided by Officer McGrath?

9 MR. ABEL: Objection. Asked and answered.

10 THE COURT: Sustained.

11 Q In your investigation, did you determine how
12 Mr. Tranchina sustained the other injuries that were
13 reported by the nurse?

14 A Just as the officer reported to me.

15 Q Okay. So -- okay. So did the -- so what did you
16 determine? How did you determine on that date how
17 Mr. Tranchina had sustained his injuries?

18 A He was involved in a use of force. The officer
19 stated that he was -- fell into the heating register,
20 and then they were forced to the ground. He said there
21 was a violent struggle where Inmate Tranchina kept
22 violently turning side to side on the carpet until he
23 was able to apply mechanical restraints.

24 Q Fair to say he didn't mention anything about rock
25 salt?

~~BARNABY - DIRECT - ROCHE~~

1 A At that time, no, I don't think so.

2 Q So fair to say that Officer McGrath just told you
3 that it was -- this whole thing was caused by him taking
4 down and Mr. Tranchina and rolling around on the ground
5 a little bit?

6 MR. ABEL: Objection; asked and answered.

7 THE COURT: Sustained.

8 BY MR. ROCHE:

9 Q Fair to say that his explanation of rock salt is --
10 came at a later time, right?

11 A I don't know when rock salt came in.

12 Q Did Officer McGrath provide you an explanation as
13 to what had caused the injuries to his knuckles?

14 MR. ABEL: Objection; asked and answered.

15 THE COURT: Sustained. Please don't be
16 repetitious. You asked that at the beginning.

17 Q Sergeant, did you find it questionable that a frisk
18 process with a hundred students would take place in a
19 tiny little foyer or tiny vestibule?

20 A No.

21 Q Did you find it questionable that an officer
22 would choose to conduct a pat frisk of a student body
23 of approximately a hundred people in an area where
24 there's -- it can't be used viewed by another officer
25 and there's no cameras present? Did you find that

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1 questionable?

2 A No.

3 Q Sergeant, would you have any security concerns as a
4 supervisor in a prison, would you have any security
5 concerns about an officer conducting a pat frisk in a
6 tiny vestibule where other inmates would have to pass by
7 the back of the officer where he wouldn't be able to see
8 them as he's conducting his pat frisk? Would you have
9 any security concerns about that?

10 A That is at the discretion of the officer. If he
11 feels comfortable, then he continues his pat frisk.

12 Q And as a supervisor, you wouldn't advise not to
13 conduct a pat frisk in circumstances like that?

14 A If the officer feels comfortable, so do I.

15 Q Would you agree that there would be a security risk
16 in conducting a pat frisk operation in such
17 circumstances?

18 MR. ABEL: Objection. Asked and answered.

19 THE COURT: Overruled. You may answer.

20 A Not necessarily, no.

21 Q So when you were dealing with this situation on
22 January 28th, did you reach any correlation in your mind
23 between the injuries that Mr. Tranchina had sustained
24 and the injuries that Officer McGrath had sustained to
25 his fist?

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~~BARNABY - DIRECT - ROCHE~~

1 A Can you say that again?

2 Q While you were investigating, processing this
3 use-of-force incident on January 28th, 2016, did you
4 realize any correlation or did you believe that there
5 was any connection or consider that there was any
6 connection between the injuries that Mr. Tranchina had
7 sustained to his face and head and body and the injuries
8 that you observed on Officer McGrath's knuckles?

9 A No.

10 Q Did you examine the annex logbook for that day to
11 find out if there was any frisks, pat frisks, searches
12 assigned or authorized for that day?

13 A No, that would not have been in the annex logbook.

14 Q Did you examine the logbook to see if there was any
15 entry regarding pat frisks?

16 A As far as pat frisks, no.

17 Q Did you find it questionable on January 28th that
18 Officer McGrath had told you at the scene that he had
19 recovered an ice pick-type weapon and later he was
20 claiming that it was a shiv or a knife that you saw in
21 the photograph?

22 A No.

23 MR. ABEL: Objection. He's already asked that
24 question.

25 THE COURT: This one is a little bit

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~~BARNABY - DIRECT - ROCHE~~

1 different. Overruled. The answer will stand.

2 BY MR. ROCHE:

3 Q Were you protecting Officer McGrath when you filled
4 out your paperwork?

5 A No.

6 Q Were you protecting him when you testified at his
7 disciplinary hearing?

8 A No.

9 Q So there's no question that Officer McGrath was
10 present when you entered the foyer that morning.

11 Correct?

12 A Correct.

13 Q So whatever you did or didn't do inside that foyer,
14 Officer McGrath would have seen it, right?

15 A I would assume so.

16 Q So he would know what it was that you did or didn't
17 do that morning?

18 MR. ABEL: Objection; calls for speculation.

19 THE COURT: Sustained.

20 Q So you are aware that Mr. Tranchina's not only
21 accusing Officer McGrath of this matter, right? He's
22 also accusing you of kicking him. Correct?

23 A Yes.

24 MR. ROCHE: Just one second.

25 THE COURT: Yes.

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~~BARNABY - CROSS - ABEL~~

1 MR. ROCHE: Thank you, Sergeant. I have no
2 further questions.

3 THE COURT: Any questioning on behalf of the
4 Defendant McGrath? Any cross-examination?

5 MR. BLENK: Your Honor, if we could just
6 reserve until after -- we are just going to reserve
7 until Mr. Barnaby's counsel ask questions.

8 THE COURT: All right. Go right ahead.

9 CROSS EXAMINATION

10 BY MR. ABEL:

11 Q Good morning, Sergeant.

12 A Good morning, sir.

13 Q Can you hear me okay?

14 A Yes.

15 Q Okay. Sergeant, how long have you been employed by
16 the New York State Department of Corrections and
17 Community Supervision?

18 A Just over 15 years.

19 Q We'll refer to that as DOCCS if that is okay.

20 A Yes.

21 Q And at what facility are you currently employed?

22 A Clinton Correctional.

23 Q And how long have you worked at Clinton?

24 A In this supervisor's role, for about three years.

25 Q And, Sergeant, can you tell me your current height

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~~BARNABY - CROSS - ABEL~~

1 and weight?

2 A About five-eight, 230.

3 Q And can you tell me what your height and weight
4 would have been in January 2016?

5 A About five-eight, 215.

6 Q So prior to your current bid at Clinton, where did
7 you work?

8 A As officer or sergeant?

9 Q As a sergeant.

10 A I got promoted September of 2015, I reported to
11 Green Haven Correctional Facility, I worked 30 days
12 there; October 17th I reported to Bare Hill Correctional
13 Facility. I worked for Bare Hill from October of '15 to
14 August of '17, then I reported to Clinton.

15 Q Okay. Let's back up to when you first started
16 working for DOCCS.

17 When you began your employment, did you receive any
18 training?

19 A Yes.

20 Q Where was that?

21 A Albany training academy.

22 Q Is that the DOCCS training academy?

23 A Yes.

24 Q How long does that training last?

25 A Eight weeks.

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~~BARNABY - CROSS - ABEL~~

1 Q What kind of training did you generally receive at
2 the academy?

3 A It's a general overview of what to expect of the
4 job from firearms to handcuffing, transport of inmates
5 to chemical agents to legal terms. Pretty much
6 everything that -- all aspects of the job.

7 Q And you mentioned earlier that you are now a
8 sergeant, correct?

9 A Correct.

10 Q And that you have been a sergeant since 2015?

11 A Correct.

12 Q Is that considered a promotion from your position
13 you held prior to that time?

14 A Yes.

15 Q And what was your title prior to your promotion to
16 sergeant?

17 A Correction officer.

18 Q Did you seek out that promotion to become a
19 sergeant?

20 A Yes.

21 Q What did you have to do in order to receive that
22 promotion?

23 A You have to take a separate promotional test.

24 Q And what did that test consist of?

25 A General knowledge of directives, some scenarios how

~~BARNABY - CROSS - ABEL~~

1 you would handle.

2 Q Is it a written test?

3 A Yes.

4 Q And so from the time that you began working to earn
5 that promotion until you ultimately received it, how
6 long did that take?

7 A Three, four years. I'm not exactly sure.

8 Q So, Sergeant Barnaby, can you tell me why some of
9 the reasons why a corrections officer might seek out a
10 promotion to become a sergeant?

11 A It's more pay, for starters. It's -- only way to
12 advance in the department is to take these promotions,
13 and if you eventually want to be able to get captain or
14 anything above, you have to take rank of sergeant first.

15 Q Okay. So as of January 28th, 2016, how long have
16 you been a sergeant with DOCCS again?

17 A I got promoted September 17th, so roughly four
18 months.

19 Q So as of that date, had you achieved permanent
20 status as a sergeant?

21 A No.

22 Q What status did you hold on that date?

23 A I was still on probation.

24 Q What does it mean to be a probationary sergeant?

25 A When you're a new officer or new sergeant, anytime

~~BARNABY - CROSS - ABEL~~

1 you're new to the rank that you come into, DOCCS puts
2 you on a one-year probational status to determine if
3 you're qualified or capable of doing that job.

4 Q And what would happen if they found reason to not
5 keep you as a sergeant?

6 A I would have lost my sergeant status and been
7 demoted back to a officer.

8 Q To a correction officer?

9 A Yes.

10 Q What are some of the things that could result in a
11 demotion for you from sergeant to a correction officer?

12 A For poor attendance, poor reports, any disciplinary
13 charges, excessive force, any outside charges.

14 Q So if you are found to be using excessive force
15 upon an inmate while you were probationary status was in
16 effect, that could result in your demotion. Correct?

17 A Correct.

18 Q And if you were found to have failed to intervene
19 to prevent excessive force on an inmate, that also could
20 result in your demotion back to a correction officer.

21 Correct?

22 A Correct.

23 Q And Sergeant Barnaby, can you explain to the jury
24 how you arrived at Bare Hill Correctional from
25 Green Haven?

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~~BARNABY - CROSS - ABEL~~

1 A You fill out a form to -- transfer form, and then
2 if there's an opening, central office in Albany will
3 fill that spot with whoever has the most seniority to
4 get it.

5 Q Did you request a reassignment from Green Haven
6 to -- or transfer, I should say, from Green Haven to
7 Bare Hill?

8 A Yes.

9 Q Why is that?

10 A Location.

11 Q Where is Green Haven Correctional Facility located?

12 A Stormville, New York. About an hour above New York
13 City.

14 Q Okay. And why did you want to be transferred to
15 Bare Hill?

16 A Closer to my home.

17 Q And where is that?

18 A I live in Dannemora, New York.

19 Q And is that closer to Clinton Correctional
20 Facility?

21 A Yes, I live across the road.

22 Q So you live across the street from Clinton?

23 A Yes.

24 Q And what is the distance between Bare Hill and
25 Clinton?

~~BARNABY - CROSS - ABEL~~

1 A 42 miles.

2 Q So in 2016, were you driving that distance to
3 arrive from your -- from your home in Dannemora to
4 Bare Hill?

5 A Yes.

6 Q And in January of 2016, how long would that drive
7 take you each way?

8 A Between an hour and 15 to an hour and a half.

9 Q And do you have an expectation, as of 2016, as to
10 what you would have to do to receive a transfer to
11 Clinton?

12 THE COURT: How is this relevant?

13 MR. ABEL: Well, your Honor, I'll just -- I'm
14 showing --

15 THE COURT: What do you have to do to get a
16 transfer? I don't think it's relevant.

17 MR. ABEL: I'm just trying to show what -- why
18 he was not engaging in any sort of --

19 THE COURT: I understand that but that's not
20 relevant. Try to stick with relevant stuff.

21 BY MR. ABEL:

22 Q Have you ever worked at Bare Hill prior to this
23 assignment?

24 A No.

25 Q Did you socialize with Bare Hill coworkers on your

~~BARNABY - CROSS - ABEL~~

1 off time in January 2016?

2 A No.

3 Q Prior to this assignment at Bare Hill, did you know
4 Officer McGrath?

5 A No.

6 Q Prior to this assignment, did you know the
7 plaintiff?

8 A No.

9 Q And so as of the date of this incident,
10 January 28th, 2016, did you know Officer McGrath by that
11 time?

12 A Just the few times I had seen him working in my
13 area.

14 Q What area was that?

15 A The annex.

16 Q And as of January 28th, 2016, did you personally
17 know the plaintiff?

18 A No.

19 Q And did you know who Maura Mayer is as of that
20 date?

21 A I might have seen her at the facility but I did not
22 know her, no.

23 Q So as of January 2016 -- January 28th, 2016?

24 A My shift at the facility was the afternoon shift,
25 2 to 10.

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1 Q I think you -- there's been in some testimony early
2 about the layout of Bare Hill Correctional Facility with
3 regards to main facility and the annex. What dorms
4 comprised the annex?

5 A Would be H, I, J, K, L, M and N dorms.

6 Q So would the F dorm be part of the main?

7 A Yes, F was in the main compound.

8 Q So in January of 2016, can you please describe your
9 duties as a sergeant at Bare Hill.

10 A I was assigned the annex sergeant. I would make
11 daily rounds through all of the dorms in the annex. I
12 did routine -- what the state calls -- swaps. I worked
13 a different shift for another sergeant; in return, he
14 worked one of my shifts.

15 So on the day shifts that I was working for another
16 sergeant, I would also have the annex school and
17 transitional services building that is in the annex as
18 part of my area. Do daily rounds and then help the
19 other sergeants cover the chow runs.

20 Q Okay. So, for example, the 2-to-10 shift, can you
21 please describe the daily schedule that you would go
22 through as far as that shift January 2016?

23 A I would report to the watch commander, which is the
24 lieutenant, see if there's anything relevant for
25 pre-shift, anything I needed to know. Check my mailbox

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1 that's in the administration building, see if there's
2 any grievance claims, any paperwork that I needed to
3 complete.

4 Then I would go to my area, start my daily rounds.
5 Shortly after 3:00, after shift change for the officers,
6 I do rounds in all of the areas. I observe the
7 afternoon chow run. I observe the rec runs, and I --
8 just available if a call came up that I needed to be.

9 Q So with regard to, say, 2 to 10, would you work
10 generally with a certain group of officers each time?

11 A For the most part, the officers at Bare Hill had
12 what the state considers a bid. It means you do the
13 same job every day, every shift. That is your set bid,
14 so, yes.

15 Q So this incident is alleged to have occurred
16 morning of January 28, 2016. So what shift were you
17 working on that day?

18 A I was doing a double. I was working for another
19 sergeant in the morning, and I had my shift in the
20 afternoon.

21 Q So the morning shift was not your regular shift; is
22 that correct?

23 A Correct.

24 Q And why were you working the morning shift?

25 A It was a swap for another sergeant. I worked his

~~BARNABY - CROSS - ABEL~~

1 shift and he works a different day and my shift for
2 another day off.

3 Q Going to the incident alleged in this matter, how
4 do you first hear about the incident involving the
5 plaintiff?

6 A It came across my two-way radio.

7 Q Where were you when you received this call?

8 A I was making my daily rounds. I do believe I was
9 in H dorm. I'm not exactly sure, H or I dorm.

10 Q Do you recall --

11 A Sorry. And it came across my two-way for me to
12 report to the annex school.

13 Q Do you recall what you were doing when you received
14 this call?

15 A Signing the logbooks, discussing with my officers
16 if they had any issues that I needed to know about.

17 Q So, Sergeant, when you received a call like this
18 over a two-way radio, are you given an incident to which
19 you are responding?

20 A No.

21 Q Are you made aware of the purpose of your response?

22 A No.

23 Q Are you made aware at the time you receive the call
24 the officer who you are assisting?

25 A No.

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1 Q Are you made aware of any inmates who may have --
2 who may be involved in the -- in the incident to which
3 you are responding?

4 A No.

5 Q So when you received this call over your two-way,
6 would you have known that this incident involved Officer
7 McGrath or the plaintiff, Joseph Tranchina?

8 A No.

9 Q So, you testified earlier that you walked to the
10 annex school building; is that correct?

11 A Correct.

12 Q And how long did it take you to walk from your post
13 at the annex school?

14 A From where I was located, 35 to 45 seconds.

15 Q Did you walk with anyone else?

16 A No.

17 Q And when you arrived at the annex school, what did
18 you observe?

19 A There was other officers arriving at the same time
20 I was. I went to the door, opened the door, I do
21 believe two other officers entered the foyer before me.
22 I entered the foyer, the plaintiff was standing in the
23 corner, two officers, one on each side of him.
24 Officer McGrath was towards the back of the foyer
25 standing with a third officer.

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1 Q Just back up one second. Sergeant, when you
2 receive a radio call like the one you received that
3 morning, who else would receive that call?

4 A Anybody with a two-way radio.

5 Q Would that include other C.O.s?

6 A Other officers, other sergeant, lieutenants.

7 Q Would that include officers just to the annex
8 section or the main as well?

9 A The two-way radios are for everybody.

10 Q So when you first arrived at the annex school
11 building, was the exterior door open or closed?

12 A Closed.

13 Q And was Officer McGrath among those officers in the
14 foyer?

15 A Yes.

16 Q So you said earlier that the plaintiff was
17 standing; is that correct?

18 A Correct.

19 Q Was he standing under his own power?

20 A Yes.

21 Q Was he in restraints?

22 A Yes.

23 Q When you arrived?

24 A Yes. He was handcuffed from the rear.

25 Q What do you mean?

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~~BARNABY - CROSS - ABEL~~

1 A His hands behind his back.

2 Q Okay. You said the -- the plaintiff was standing
3 in the corner. Correct?

4 A Correct.

5 Q Which direction was he facing?

6 A He was facing the corner.

7 Q Okay.

8 A If you come in the exterior door, he was in the top
9 left-hand corner facing the corner.

10 Q So as you walk into the foyer, could you see the
11 plaintiff's face?

12 A No.

13 Q Did you speak with Officer McGrath upon arriving at
14 the annex school?

15 A Yes.

16 Q Did he apprise you of the situation upon your
17 arrival?

18 A Yes.

19 Q One other issue, Sergeant.

20 There was some testimony earlier about frisks in
21 the outside or the exterior of the buildings. Are
22 exterior frisks generally acceptable practice at
23 Bare Hill?

24 A At Bare Hill, no.

25 Q Why is that?

~~BARNABY - CROSS - ABEL~~

1 A Bare Hill is going through a lengthy lawsuit that
2 comprised -- before I had gotten there -- about a
3 sergeant frisking inmates in the winter months where
4 some of the inmates received frostbite. So we were
5 advised unless it was a dire necessity, not to frisk
6 outside during winter months.

7 Q Are there cameras near the annex school building?

8 A No.

9 Q Where would they be located at the facility?

10 A The only cameras at Bare Hill are on the exterior
11 fence line.

12 Q Okay. So when Officer McGrath apprised you of the
13 situation, what did he report to you?

14 A He stated to me that he was --

15 MR. ROCHE: Objection, hearsay.

16 THE COURT: Overruled.

17 A He stated that he was just involved in a use of
18 force with Mr. Tranchina, that he had recovered a
19 weapon.

20 Q And how long were you in the foyer?

21 A Matter of 30 seconds maybe.

22 Q Did you examine the plaintiff, Mr. Tranchina?

23 A At that time, no.

24 Q Why is that?

25 A He was standing on his own power, that -- did not

~~BARNABY - CROSS - ABEL~~

1 observe any injuries at the time. I talked to
2 Officer McGrath, I directed him to report to the
3 infirmary to be seen for his injuries. I turned -- I
4 asked the plaintiff what happened, he didn't make any
5 statements to me.

6 I directed the officer that was controlling the
7 mechanical restraints to exit the foyer with him and
8 place him in the van.

9 Q So you said that the plaintiff was -- didn't say
10 anything to you about his condition when you asked him?

11 A No.

12 Q Did he appear nonresponsive or did he just appear
13 he did not want to make a statement to you?

14 A He just -- he turned his head in the opposite
15 direction. I was standing behind him. He kind of just
16 moved his head, didn't make any comments to me.

17 Q Was his back still to you at that time?

18 A Yes.

19 Q You said -- what happened next?

20 A We exited the foyer, myself and the officer that
21 was doing the escort. We brought him to the rear of a
22 state-issue van, both rear doors were opened, the
23 officer had placed him -- told him to sit in the van,
24 put his feet in, the doors were shut. I sat in the
25 front passenger side and the officer sat -- well, in the

~~BARNABY - CROSS - ABEL~~

1 driver's side and we left the area and went straight to
2 the special housing unit.

3 Q Who drove the van?

4 A Officer Rabideau.

5 Q And where did you sit?

6 A In the passenger side up front.

7 Q And where in relation to the school building is the
8 special housing unit?

9 A You have to leave the annex, go up through the
10 compound gate, all the way up on the right-hand side of
11 the main compound. There's a separate building for the
12 special housing unit.

13 Q And how long a drive approximately from the annex
14 school building to the special housing unit?

15 A Approximately 30 seconds.

16 Q Did the plaintiff make any complaints to you at
17 that time about his condition?

18 A No.

19 Q So upon the arrival of the escort van at special
20 housing unit, did you bring the plaintiff out of the van
21 into the building?

22 A No. Officer Rabideau would have exited the
23 plaintiff out of the rear of the van. I would have
24 radioed into the special housing unit, the officer would
25 have met us at the door. The plaintiff would have

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1 stepped in, Officer Rabideau's escort would have been
2 completed at that time; he would have left, and I would
3 have entered the special housing unit with the
4 plaintiff.

5 Q Just the two of you?

6 A Yes.

7 Q So upon your entry into the special housing unit,
8 what did you do next?

9 A He's brought into the admission room with the
10 special housing unit officers. I do believe it was one
11 officer at the time. I directed him to perform a strip
12 frisk of the plaintiff. Inmate was stripped, no further
13 contraband was found on his persons, and as soon as the
14 strip frisk was complete, I had requested medical to
15 evaluate him.

16 Q From the time you entered into the special housing
17 unit until the time that you requested a medical exam of
18 the plaintiff, how much time passed?

19 A As soon as I got to the special housing unit,
20 medical would have been notified that he was there. So
21 maybe a matter of a minute or two.

22 Q The medical exam was at your request, correct?

23 A Yes.

24 Q And do you recall who performed that medical exam?

25 A I do believe it was R.N. Mulverhill.

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1 Q So while you were in the foyer, did you observe any
2 use of force upon the plaintiff?

3 A No.

4 Q When you were in the escort van, did you observe
5 any use of force upon the plaintiff?

6 A No.

7 Q What about when you were in the special housing
8 unit? Did you observe any use of force upon the
9 plaintiff?

10 A No.

11 Q Did you observe anyone slapping the plaintiff?

12 A No.

13 Q Or hitting the plaintiff?

14 A No.

15 MR. ABEL: Ms. Norton, if I could have D-7.
16 I'm sorry. Could I have D-F.

17 Q Do you recognize this document?

18 A Yes.

19 Q What is this document?

20 A It's an inmate misbehavior report.

21 Q And do you see the incident date on this document?

22 A Yes, 1/28/16.

23 Q If I could just -- scroll down.

24 COURT CLERK: On the first page?

25 MR. ABEL: Yes.

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1 Q Do you see the signature at the very bottom of the
2 screen?

3 A Yes.

4 Q Is that your signature?

5 A No.

6 MR. ABEL: Thank you.

7 Q Sergeant, did you ever kick the plaintiff on
8 January 28th, 2016?

9 A No.

10 Q Did you ever otherwise strike the plaintiff on that
11 date?

12 A No.

13 Q Have you -- in your 15 years as a correction
14 officer, now sergeant, have you ever used excessive
15 force upon an inmate?

16 A No.

17 Q Have you ever in that same period of time witnessed
18 other officers using excessive force from failure to
19 intervene?

20 A No.

21 Q Sergeant, did you have anything to do with the
22 transfer of the plaintiff at the Attica Correctional
23 Facility?

24 A No.

25 Q In your role as a sergeant, are you involved in

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1 arranging for the transfers of inmates in general?

2 A No.

3 Q Where is -- who handles those matters?

4 A All transfers come through central office in
5 Albany.

6 Q During the medical exam by Nurse Mulverhill, did
7 you instruct her to make any notation into her notes?

8 A No.

9 MR. ABEL: One second, your Honor.

10 Q Sergeant, did you -- back in January of 2016 was
11 Miss Mayer under your supervision as a sergeant?

12 A I don't ever recall her being in my area. It's
13 very possible she was resource. She might have for a
14 shift or two but I don't recall.

15 Q You recall your deposition that you testified about
16 earlier. Correct?

17 A Yes.

18 Q I'm just looking at page 89, line 2. Do you recall
19 this question, giving this answer:

20 "QUESTION: Okay. And when you went into the
21 school annex on January 28th, 2016, you testified
22 earlier that you recall seeing mud and dirt. That's
23 correct? Right?

24 "ANSWER: Yes."

25 MR. ROCHE: Your Honor, I object to this.

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1 THE COURT: Are you trying to impeach your
2 witness?

3 MR. ABEL: I'm just trying to present a prior
4 consistent statement that he offered.

5 THE COURT: No. I mean, that's in response to
6 impeachment? Just can't --

7 MR. ABEL: In response to impeachment, yes.
8 It's regarding --

9 THE COURT: Well, ask a threshold question
10 so -- you know, in other words, during your direct
11 testimony -- you can't just use a transcript to bolster
12 his testimony.

13 BY MR. ABEL:

14 Q During your direct exam you testified regarding
15 your deposition that you didn't recall seeing any rock
16 salt.

17 MR. ROCHE: Objection, your Honor.

18 THE COURT: Let me hear the question. Go
19 ahead.

20 Q You testified earlier that you -- you don't recall
21 seeing rock salt or mud or dirt on the floor of the
22 foyer; is that correct?

23 THE COURT: You may answer that.

24 A Correct.

25 Q But do you recall testifying during your

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1 deposition -- do you recall Mr. Roche asking you during
2 your deposition -- during your direct exam you did not
3 see rock salt on floor?

4 A Correct.

5 Q Do you recall testifying during your deposition,
6 however, that you -- that there was --

7 MR. ROCHE: Objection, Judge.

8 THE COURT: Go ahead. Get the question out.

9 Q Do you recall being asked during your deposition it
10 was possible that you saw mud or rock salt on the floor
11 of the foyer?

12 A Yes.

13 Q Okay.

14 THE COURT: Do you have a question and answer
15 in the transcript that you can read to him? Were you
16 asked this question and did you give this answer?

17 MR. ABEL: Yes, page 89, line 7.

18 THE COURT: Do it that way.

19 MR. ROCHE: Your Honor --

20 THE COURT: I'm going to allow it but it has
21 to be in the form of were you asked this question and
22 did you give this answer. Go ahead.

23 BY MR. ABEL:

24 Q Referring to line 7, were you asked this question
25 and did you give this answer: Is it possible that there

~~BARNABY - CROSS - BLENK~~

1 was also rock salt, and answer, yes.

2 A Yes.

3 Q Thank you.

4 MR. ABEL: No further questions.

5 THE COURT: Okay. Any questions, Mr. Reed?

6 Mr. Blenk?

7 MR. BLENK: Yes, your Honor.

8 CROSS EXAMINATION

9 BY MR. BLENK:

10 Q Thank you for being here today, Mr. Barnaby, just
11 like yesterday, but you heard some testimony yesterday
12 about whether at Bare Hill on that day and whether on
13 Bare Hill on -- in general, and Mr. Tranchina testified
14 to the fact that Bare Hill -- it was -- on the 28th it
15 was nicer-than-normal winter day. Do you remember that
16 testimony?

17 A Yes.

18 Q Bare Hill is a pretty rough climate; is that
19 correct?

20 A Correct.

21 Q So even on a above-average day, the Bare Hill --
22 the climate at Bare Hill is unforgiving?

23 A Correct.

24 Q You testified, Mr. Barnaby, that Mr. Miranda didn't
25 tell you that rock salt had caused his injuries at the

~~BARNABY - CROSS - BLENK~~

1 time you saw him in the vestibule; is that correct?

2 A Correct.

3 Q Did you ask Mr. Miranda what had caused his
4 injuries?

5 A No.

6 Q And in putting together the paperwork for
7 use-of-force report, you wouldn't -- it wouldn't be
8 unusual for you to leave out the floor conditions in
9 describing a use of force; is that correct?

10 A Correct.

11 Q And you testified that it was your decision to
12 bring Mr. Tranchina to the infirmary rather than
13 bringing -- or -- I'm sorry -- bringing him to the SHU
14 rather than bringing him immediately to the infirmary.
15 Correct?

16 A Correct.

17 Q If you would have encountered an inmate who looked
18 like he had been punched 40 to 50 times, would you have
19 brought him to the infirmary?

20 A Depending on the severity of the injuries, yes.

21 Q Were you aware of Plexiglas shanks circulating at
22 the Bare Hill Correctional Facility around the time of
23 January 2016?

24 A Yes.

25 Q How did you become aware of that?

~~BARNABY - CROSS - BLENK~~

1 A On a daily report, our pre-shift in the morning,
2 any weapons or contraband had been found, lieutenant
3 would relay the information via photos of the weapons.
4 I do believe there were a few others found that month.

5 Q So you had seen photographs of Plexiglas shanks?

6 A Yes.

7 Q I believe that you testified that you don't
8 generally socialize with Bare Hill, that you did not
9 generally socialize with the Bare Hill Correctional
10 Facility staff while you worked there. That's -- that
11 applies specifically to Mr. McGrath, correct? You did
12 not socialize outside work with Mr. McGrath?

13 A No, I did not.

14 Q You did not socialize with Mr. McGrath or with
15 Miss Mayer?

16 A I did not.

17 Q In fact, by the time of the incident, you had only
18 been working at Bare Hill for about three months; is
19 that correct?

20 A Correct.

21 Q Thank you. Mr. Barnaby, were you aware of any
22 rules or contraband issues -- rule breaking or
23 contraband issues going on the school annex around the
24 time of the incident?

25 A Yes.

~~BARNABY - REDIRECT - ROCHE~~

1 Q Can you tell me about those.

2 A The regular officer that worked the school had
3 relayed to me that there had been excessive amounts of
4 tobacco being brought into the school, that the inmates
5 were smoking in the bathroom, which is rule violation.
6 But more so, that they continued to go from classroom to
7 classroom to use the bathroom to smoke was more of a
8 distraction, disturbance in the area.

9 Q What did you do about that issue?

10 A I discussed it with the watch commander the day
11 before. I had requested that if we had unassigned
12 staff, if I could get an officer to -- to do random pat
13 frisks at the annex school to curtail the excessive
14 tobacco coming in.

15 Q Specifically, you're testifying that on
16 January 27th the day before the incident, you requested
17 an officer to be placed at the school annex for pat
18 frisking?

19 A Correct.

20 Q Thank you.

21 MR. BLENK: No further questions.

22 THE COURT: Anything else, Mr. Roche?

23 MR. ROCHE: Yes, your Honor.

24 REDIRECT EXAMINATION

25 BY MR. ROCHE:

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~~BARNABY - REDIRECT - ROCHE~~

1 Q So with regards to your testimony just now that you
2 requested a pat frisk at the annex school on
3 January 28th, who did you make that request of?

4 A It would have been the watch commander on the 27th.

5 Q And who was that?

6 A I don't know.

7 Q And do you know --

8 MR. ROCHE: I would ask that the witness be
9 shown -- I believe it's Plaintiff's 21.

10 COURT CLERK: Plaintiff's 21?

11 MR. ROCHE: Yes. Can we scroll down?

12 BY MR. ROCHE:

13 Q Sergeant, do you recognize this document?

14 A Yes.

15 Q And is this the control chart log for the
16 7-to-3-shift on January 28th, 2016?

17 A No. This is a tracking sheet used for what other
18 sergeants and certain officers know who's working what
19 areas.

20 Q Okay. So you call it what? A tracking chart?

21 A Tracking sheet.

22 Q Tracking sheet. Okay. So you see the -- the entry
23 at the bottom right-hand corner of that -- of that
24 document?

25 A Yes.

~~BARNABY - REDIRECT - ROCHE~~

1 Q Okay. And it's McGrath J., frisk annex school?

2 A Correct.

3 Q Is that your -- is that in your handwriting?

4 A No.

5 Q Do you know whose handwriting that is?

6 A I do not.

7 MR. BLENK: Objection, your Honor.

8 THE COURT: Overruled. If you know, he may
9 answer.

10 Q And who would make that entry, which -- which
11 sergeant or which officer would make an entry such as
12 that in the -- in this tracking sheet?

13 A The day sergeant would fill out that tracking sheet
14 the day before.

15 Q Okay. And so the -- the day sergeant from the day
16 before would fill it out the day before stating what the
17 assignments are for the next day. Correct?

18 A Yes.

19 Q Okay. Thank you. Now, just bringing you back to
20 the incident, I believe you testified in response to my
21 questions that you -- when you arrived at the annex,
22 there were other officers already there. Is that
23 correct?

24 A Yes.

25 Q Okay. And then -- I was unclear from your

~~BARNABY - REDIRECT - ROCHE~~

1 testimony.

2 THE COURT: Just ask the question. Just ask a
3 question, don't tell us if you're unclear.

4 MR. ROCHE: Okay.

5 THE COURT: Just ask a question.

6 BY MR. ROCHE:

7 Q Okay. Now in your -- you testified at a deposition
8 and in this matter, right? We have talked about that
9 already.

10 A Yes.

11 Q So just going to page 38, line 7. Were you asked
12 these questions and did you give these answers:

13 "QUESTION: Well, would you -- you said you
14 responded and other officers were responding at the same
15 time. So among you and those other responding officers,
16 were you the first one through that door or were there
17 other officers first?

18 "ANSWER: I opened the door and were other officers
19 that went in before I stepped inside.

20 "QUESTION: Okay. So, now, would you open the
21 door?

22 "ANSWER: Yes. And then some of those other
23 officers stepped? Is that what you're saying? [Sic]

24 "ANSWER: Yes."

25 MR. ABEL: Objection. I don't think he's

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~~BARNABY - REDIRECT - ROCHE~~

1 testified to anything inconsistent with this, your
2 Honor.

3 THE COURT: What was that?

4 MR. ABEL: I don't think he's testified to
5 anything that's inconsistent with this.

6 THE COURT: I think that the question goes to
7 the timing of who was in first or who came after. So
8 overruled.

9 BY MR. ROCHE:

10 Q Were you asked these questions, did you give those
11 answers?

12 A Yes.

13 Q Okay. So does that refresh your recollection that
14 you had arrived at the door to the annex before any
15 officers went inside?

16 A No, there was also officers inside the foyer before
17 I arrived.

18 Q But in this question, you said that you opened the
19 door and the other officers went?

20 A For the responding officers that responded at the
21 same time as I did.

22 Q Okay. So when you opened the door and the other
23 officers were inside, did you -- did you know -- find
24 out who those officers were?

25 A No.

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~~BARNABY - REDIRECT - ROCHE~~

1 Q Did you question those officers about what they had
2 seen?

3 A No.

4 Q Okay. Did you ever find out whether those officers
5 were witness to the use-of-force incident?

6 A Officer McGrath said he was the only one present at
7 the time of the use of force.

8 Q So you didn't ask any other officers what if
9 anything they had seen?

10 A No.

11 Q So it's fair to say you prepared a to-from report
12 in this matter, right?

13 A Correct.

14 Q And that was directed to your -- your direct
15 supervisor. Correct?

16 A To the captain's office.

17 Q Okay. And that to-from was an account of what
18 happened in this use of force. Correct?

19 A Yes.

20 Q Okay. And your account of what happened was based
21 on -- just solely upon what Officer McGrath had told you
22 what had happened?

23 A What he had reported to me.

24 Q Okay. And also in your to-from you included
25 information -- medical information, right? from

~~BARNABY - REDIRECT - ROCHE~~

1 Nurse Mulverhill?

2 A Correct.

3 MR. ROCHE: Okay. I would ask that the
4 witness's to-from, which I believe is Plaintiff's 5,
5 would be shown to him.

6 COURT CLERK: That's not in evidence. I can
7 show it to the witness.

8 THE COURT: You can show it to the witness,
9 it's not in evidence. Don't read from it, please. Is
10 it your intention to offer it?

11 MR. ROCHE: Yes, your Honor.

12 THE COURT: Is there any objection?

13 MR. BLENK: No, your Honor.

14 MR. ABEL: No, your Honor.

15 THE COURT: Plaintiff's 5 is received. You
16 may read from it.

17 (Plaintiff's Exhibit 5, received)

18 MR. ROCHE: Your Honor, I don't need to read
19 from it at this time.

20 THE COURT: Okay. Well, it's in evidence.

21 MR. ROCHE: Thank you.

22 BY MR. ROCHE:

23 Q That when you went into the vestibule area, you
24 asked Mr. Tranchina if he wanted to speak to you, right?

25 A I had asked him what had happened.

~~BARNABY - REDIRECT - ROCHE~~

1 Q Okay. And he didn't respond, right?

2 A No.

3 Q And when you asked that, Officer McGrath was
4 standing right there, right?

5 A No, he had exited already.

6 Q I believe you testified in response to your
7 lawyer's questions that you never socialized with the
8 Bare Hill correction staff.

9 A Up until that point, no, I did not.

10 Q But at that time, you would go to the -- on
11 occasion to The Pines bar. Correct?

12 A Not at that time, no.

13 Q So is it your testimony that you had never been to
14 The Pines bar prior to this incident?

15 A Prior to this incident, no.

16 Q So when -- in your deposition were you asked these
17 questions and did you give these answers? Page 66,
18 line 5:

19 "QUESTION: Do you know of a bar called The Pines?

20 "ANSWER: Yes."

21 MR. ABEL: Objection, your Honor.

22 THE COURT: What's your objection? I'm sorry.

23 MR. ABEL: There's nothing in here that
24 contradicted anything he's testified.

25 THE COURT: Well, you know, he just elicited

~~BARNABY - REDIRECT - ROCHE~~

1 an answer that the witness had never socialized and had
2 never been to The Pines bar so I won't know until I hear
3 the impeachment attempt. Go ahead.

4 BY MR. ROCHE:

5 Q So when you were at your deposition, you were being
6 asked questions of -- about the incident and events
7 around the time of the incident, correct?

8 A Correct.

9 Q Okay. And were you asked these questions and did
10 you give these answers:

11 "QUESTION: Do you know a bar called The Pines?

12 "ANSWER: Yes.

13 "QUESTION: Had you ever been there?

14 "ANSWER: Yes. Was it a regular place that you
15 went to? [Sic].

16 "ANSWER: Not regular, no. I'm not from that
17 location. When I did my doubles, I stayed at a friend's
18 house that was in that area. On occasion after a shift,
19 I would go there to have a beverage."

20 Were you asked those questions and did you give
21 those answers?

22 THE COURT: You may answer.

23 A Yes.

24 Q When a weapon is recovered at the Bare Hill
25 Correctional Facility, what's -- when it's recovered

~~BARNABY - RECROSS - ABEL~~

1 from an inmate, what's the -- what's done with the
2 actual physical items after it's recovered?

3 A When the officer would secure it on his person,
4 report to the administration building just outside the
5 captain's office. Digital photos and dimensions of the
6 weapon would be taken.

7 It would be secured in an evidence bag and locked
8 into the evidence locker for a Directive 4910A.

9 Q Would it be fair to say that at any particular time
10 the evidence locker would be likely to contain various
11 weapons that were recovered from inmates at the
12 facility?

13 MR. ABEL: Objection.

14 THE COURT: Overruled. You may answer.

15 A Any contraband that's recovered.

16 MR. ROCHE: Thank you, Sergeant. Nothing
17 further.

18 THE COURT: Any recross, Mr. Abel?

19 RECROSS EXAMINATION

20 BY MR. ABEL:

21 Q Have you ever worked as the chart sergeant at Bare
22 Hill?

23 A Up to this point, no.

24 Q And prior to January 28th, 2016, have you worked as
25 a chart sergeant?

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~~BARNABY - RECROSS - ABEL~~

1 A No.

2 Q What about on that day?

3 A No.

4 Q So you requested a pat frisk at the annex school,
5 correct?

6 A Correct.

7 Q Did you specifically assign Officer McGrath to
8 perform the pat frisk?

9 A No.

10 Q Why did you ask for that frisk to be conducted at
11 the annex school?

12 A The officer in the school had relayed to me that
13 he --

14 MR. ROCHE: Objection. Objection. Hearsay.

15 THE COURT: I'm sorry?

16 MR. ROCHE: Withdraw. I will withdraw.

17 THE COURT: It's repetitious but go ahead and
18 finish it. Is this about the cigarettes?

19 THE WITNESS: Yes.

20 THE COURT: Okay.

21 A There's excessive amounts of tobacco being brought
22 in. Inmates were using the bathroom more frequently to
23 smoke. It's disrupting classrooms.

24 BY MR. ABEL:

25 Q So did you know who would be assigned?

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~~BARNABY - RECROSS - BLENK~~

1 A No.

2 THE COURT: The answer was no?

3 A No.

4 MR. ABEL: No further questions?

5 THE COURT: Anything else, Mr. Blenk?

6 MR. BLENK: Just quickly, your Honor.

7 RECROSS EXAMINATION

8 BY MR. BLENK:

9 Q You were aware of the procedure with respect to the
10 chart at Bare Hill Correctional Facility at the time?

11 A Yes.

12 Q And was it ordinary for after the first draft of
13 the chart is created by the sergeant the day prior to,
14 was it ordinary for that chart to be edited after that
15 point?

16 A It's possible. And if an officer had called in
17 sick, the -- whoever the chart sergeant was working when
18 the officer called in, would have to fill that position
19 for the other sergeant's charts.

20 MR. BLENK: Thank you. That's it.

21 THE COURT: Anything else?

22 MR. ROCHE: Nothing further, your Honor.

23 THE COURT: You may step down, sir. Put your
24 mask on, please, and take your water with you.

25 (Witness excused)

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1 THE COURT: Members of the jury, we have to
2 sanitize the witness box, and I think we will take
3 about -- I say five but I'm sure it will end up being
4 ten minutes to get the witness box sanitized and then we
5 will have the next witness.

6 During this break, do not discuss this case
7 amongst yourselves or with anyone else. Continue to
8 follow all of the instructions that I have given you.
9 Thank you.

10 (Jurors excused)

11 THE COURT: Who is the plaintiff's next
12 witness?

13 MR. WEISS: We are going to call Lieutenant
14 Conto.

15 THE COURT: On the issue of Officer Laramay
16 that you brought up this morning, right?

17 MR. MIRANDA: Yes, your Honor.

18 THE COURT: What day did you subpoena him?

19 MR. MIRANDA: We -- for today, your Honor.

20 THE COURT: Okay. And did he give you a
21 reason or is it just I'm not showing up because I'm
22 busy?

23 MR. MIRANDA: He -- he indicated -- Mr. Blenk
24 spoke with him.

25 MR. BLENK: He indicated that he had family in

1 from out of town and that he was four hours away. So
2 those are the -- that was the explanation that he had
3 given.

4 THE COURT: Is that the first time he
5 indicated he had any problem with a subpoena?

6 MR. MIRANDA: Yes. I can tell you that from
7 speaking with Mr. Sturgess and trying to contact
8 Mr. Laramay several times, he had indicated before he
9 was amenable to coming down.

10 THE COURT: What is the defense position with
11 respect to me allowing -- what is the plaintiff's
12 position with respect to me allowing the defense to read
13 from portions of a transcript, with the plaintiff being
14 able to read from other portions of the transcript that
15 you think are important to your case?

16 MR. ROCHE: Your Honor, we would oppose it. I
17 believe that we -- our office wasn't even present at the
18 deposition of Lieutenant Laramay. From the
19 representations that's being made by counsel, that's --
20 doesn't qualify I believe as unavailability.

21 THE COURT: Why weren't you there?

22 MR. ROCHE: Because I -- I -- I believe it
23 was -- the deposition was conducted by counsel for
24 Officer McGrath. I wasn't involved in the case back
25 then but I believe we may have just decided not to

1 appear.

2 MR. MIRANDA: If I may.

3 THE COURT: Yes.

4 MR. MIRANDA: We were coming up to the close
5 of discovery in front of Magistrate Lovric, and we had
6 been trying to schedule the depositions for some time.
7 We got to the conference and plaintiffs all of a sudden
8 indicated that they thought that discovery was closed.
9 We had to file A letter motion in front of THE
10 magistrate. He essentially admonished plaintiffs on the
11 record for their conduct. He allowed us to move forward
12 with the depositions, and then plaintiffs didn't show
13 for five or six of them that took place in November of
14 2019 in Massena.

15 THE COURT: Let me just make clear that no
16 witness has a right to ignore a subpoena. Period. End
17 of story. And Monday is not going to work for me
18 because I'm hoping that we have a verdict sometime
19 tomorrow. So highlight whatever you think it is you
20 want to read, get me a copy, and then I will make a
21 decision, but if I decide that the reading of the
22 transcript is inappropriate, then I will send the
23 marshal to get this officer.

24 People -- and this goes for every witness in
25 this case. No one can get a subpoena and just say no,

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CONTO - DIRECT - WEISS

1 thanks, and we should have known well before today that
2 this isn't convenient for him and he would rather come
3 Monday. Witnesses do not control my court.

4 I have jurors here. I'm not yelling at you, I
5 am raising my voice because it ticks me off. I have
6 jurors here under COVID conditions, I have all of you
7 here under COVID conditions, and I have law enforcement
8 saying it's not convenient? That's nonsense.

9 So, while we're on this break, communicate
10 with your witness and tell him that I said it's nonsense
11 and that if I order him to be here later today or
12 tomorrow, he will be here or I will send the marshals to
13 get him. This is absolute nonsense. Subpoenas are not
14 light suggestions. They are orders.

15 We stand in recess for ten minutes. I'm not
16 angry at you. I realize that I'm raising my voice but
17 this is the second time that I've been told during this
18 trial that a witness doesn't feel like showing up, and I
19 think all witnesses, if we are going to have any more
20 who have this feeling, need to be talked to by counsel.

21 (Recess taken)

22 COURT CLERK: Take a seat at the witness
23 stand. State your full name for the record.

24 THE WITNESS: Daniel Conto.

25 D A N I E L C O N T O , having been duly sworn, was

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1 examined and testified as follows:

2 THE COURT: Have a seat, sir. I've let other
3 witnesses know that if you feel you need to remove your
4 mask to testify, you may. It's entirely up to you.

5 Record will reflect that our last two
6 witnesses, the defendants chose to remove their masks as
7 they had the right to do, and so they were not having
8 face covering while they testified and, again, it's up
9 to -- I see you are removing it. Go ahead. That was
10 quick.

11 Whenever you're ready, Mr. Roche or Mr. Weiss.

12 MR. ROCHE: It's Mr. Weiss.

13 DIRECT EXAMINATION

14 BY MR. WEISS:

15 Q Thank you. Good morning, Mr. Conto.

16 A Good morning.

17 Q How long have you been working at Bare Hill
18 Correctional Facility?

19 A At Bare Hill, six years.

20 Q And when were you promoted to lieutenant?

21 A Three years ago.

22 Q Were you working at Bare Hill Correctional back in
23 January of 2016?

24 A I was.

25 Q And what was your designation back then?

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CONTO - DIRECT - WEISS

1 A I was a sergeant.

2 Q Did you work as a chart sergeant ever around that
3 time?

4 A Yes, that was my bid-on days.

5 Q Can you briefly describe the duties and
6 responsibilities of a chart sergeant.

7 A You're in charge of the shift as far as assigning
8 officers to the posts that -- make sure they're where
9 they're supposed to be, where they're covering mess
10 hall, rec runs and being at their allotted locations at
11 the time they are supposed to be.

12 Q Were you working as a chart sergeant on
13 January 27th and 28th of 2016?

14 A Yes.

15 MR. WEISS: I ask that the Court display
16 what's in evidence as Plaintiff's Exhibit 21.

17 Q Do you recognize this document?

18 A I do.

19 Q Can you briefly explain to the jury what this
20 document is and what its purpose is.

21 A We call it a cheat sheet. When we do a -- grids
22 for the day, day shift alone has 14 pages of tracking.
23 This is just a condensed version. It's on a legal-sized
24 paper and it has everybody's name and job number that's
25 working that day, as opposed to going through all the

CONTO - DIRECT - WEISS

1 relief officers and stuff. It's just a condensed
2 version. We call it a cheat sheet because it helps us
3 verify who is there and where they're supposed to be.

4 Q Would this be used by the chart sergeants to tell
5 correction officers where to put -- what their
6 assignment was for the day in the morning?

7 A Yes.

8 Q What day is this assignment sheet for?

9 A 1/28/16.

10 Q What shift?

11 A 7 to 3.

12 MR. WEISS: Now, if the Court would please
13 scroll down. That's good.

14 Q I noticed that most of the assignments are typed.
15 What's the difference between the typed and the
16 handwritten ones?

17 A I created the form and as I do it, I type it in.
18 What happens is when somebody, through the body, calls
19 in sick, they get whited out, and then where it says the
20 extras, their name was down there at one point and then
21 they get highlighted or whited from down there and put
22 into the jobs.

23 So, for instance, Charlin was a resource officer
24 that day. You know, Jim Loffinbeck called in sick, so
25 he was assigned to cover the Jim Loggins so his name was

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CONT0 - DIRECT - WEISS

1 handwritten up into that position, which is why
2 there's the white-out at the bottom.

3 Q Now, this is the assignment sheet for January 28th,
4 2016. Would this have been created or would the
5 assignments have been decided on January 28th or the day
6 before, January 27th?

7 A It's made the day before. The day prior.

8 Q Did you make this chart on January 27th, 2016?

9 A I did.

10 Q I'd like to direct your attention to the bottom
11 right-hand corner. Do you see where it says McGrath J.,
12 frisk annex school?

13 A Yes.

14 Q Did you make that entry?

15 A I wrote McGrath, J. -- McGrath, J. on the 27th.
16 When I came in on the day of the 28th, it was written --
17 frisk annex school was written by somebody else, and
18 then the 62 is the radio number that he was assigned for
19 the day. So the beginning of that and the ending of
20 that is my writing.

21 Q Do you know who wrote in frisk annex school?

22 A No, I don't.

23 Q Who would be allowed to make that kind of entry?

24 A Supervisors have access to it. If they have an
25 ongoing investigation, they come across something, they

— CONTO - DIRECT - WEISS —

1 need an area frisked or a cube frisked or something. I
2 have had captains make notes on there for certain tasks
3 to be completed. I have had lieutenants. Sergeants
4 would technically go through, have to get authorization
5 but they also written stuff on it.

6 I have had the dep of security go down and put
7 stuff on, make notations on there to cover certain
8 things. If there's ongoing investigations, I go on
9 through the whole day, weeks, whatever for the facility,
10 and if somebody comes across something, they come up and
11 they put it on there because as long as there's bodies,
12 they will assign people to cover to do the tasks.

13 Q Would it be fair to say that a lot of corrections
14 officer have access to this chart?

15 A Officers?

16 Q Yeah.

17 A It's -- when we finish it the day before, it's
18 normally between 9:30, 10:00. Again, I say "regularly"
19 because you don't know what happens if you have an
20 emergency medical trip or if you have something else
21 going on, you can't stop doing the emergency stuff to do
22 your charts. When it gets completed, it's put on a
23 clipboard and it's hung behind the chart desk, it gets
24 hung on the wall by a shift. It's not locked down as
25 far as to where nobody can touch it.

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1 So do officers have access to it? Yes. They -- as
2 a rule -- all as a rule, they can't alter it.

3 Q And just to be clear, so when you left work on
4 January 27th, 2016, you had written McGrath, J., but you
5 didn't write anything next to it?

6 A No.

7 Q And then --

8 A On the 28th, I wrote 18, whatever the next day, I
9 wrote the 62 because that was the radio he was assigned
10 that morning.

11 Q So when you came in on the morning of the 28th and
12 you looked at this, had somebody already written in
13 frisk annex school?

14 A Yes.

15 Q Was any other regular chart sergeants there that
16 day that were able to explain who wrote that in?

17 A I never asked them. It was nothing out of the
18 norm. It happens quite frequently but during an
19 investigation into -- it's not out of norm for somebody
20 to write down to frisk. So when I saw it there, I
21 didn't question it because I didn't feel the need to
22 because it happens frequently.

23 Q So it didn't arouse any suspicions, is what you're
24 saying?

25 A Yes.

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1 Q Okay. Did there ever come a time that an
2 investigator from the Office of Special Investigations
3 asked you about this -- this chart?

4 MR. MIRANDA: Objection. Hearsay.

5 THE COURT: Overruled. You may answer yes or
6 no. Did an officer ask you about this chart?

7 A Yes.

8 Q Do you remember --

9 A It was, like, five years ago I'm assuming.

10 Q Do you -- so tough to remember?

11 A Well, I've talked to a lot of people about it. I
12 don't know exactly what the jobs these people have
13 but --

14 Q Okay.

15 MR. WEISS: I ask the Court display just to
16 the witness Plaintiff's 29-G now in evidence.

17 THE COURT: All right. Just to the witness,
18 please.

19 BY MR. WEISS:

20 Q If you could scroll down, Lieutenant Conto, just
21 take a second to read this document and then let me know
22 when you're finished.

23 A Yes.

24 Q Does this refresh your recollection at all?

25 A Yes.

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1 Q Okay. What is this document?

2 A Pardon?

3 Q What is this document that you are looking at?

4 A It's a memo that I wrote to OSI Mitchell.

5 Q And do you remember creating this document in
6 relation to being asked about the chart that we were
7 looking at before?

8 A Yes.

9 Q And is this a fair and accurate copy of the memo
10 that -- the to-from memo that you created?

11 A Yes. It's got my signature on it.

12 MR. WEISS: Your Honor, I ask what's been
13 marked as Plaintiff's 29-G be admitted into evidence.

14 THE COURT: Any objection on behalf of
15 Defendant McGrath?

16 MR. MIRANDA: No objection, your Honor.

17 THE COURT: Any objection on behalf of
18 Defendant Barnaby?

19 MR. REED: No, your Honor.

20 THE COURT: Okay. 29-G is received.

21 (Plaintiff's Exhibit 29, received)

22 Q Now can you explain just briefly why you wrote this
23 memo and what you were explaining to OSI.

24 THE COURT: I'm just going to point out that I
25 think the answer is going to be completely cumulative to

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1 the testimony that he just gave. You can answer that
2 question but we're not going to continue to be
3 repetitious.

4 A Memo just states that on the 27th and 28th that I
5 worked and that I didn't write to assign Officer McGrath
6 to do the pat frisks in the school, and then that he was
7 given radio 62 from the arsenal, which is why I know his
8 name and the radio number was what I wrote in my
9 handwriting.

10 Q Were you ever made aware why OSI was asking these
11 questions?

12 MR. MIRANDA: Objection.

13 THE COURT: Sustained.

14 Q Lieutenant Conto, are you aware of anybody else who
15 was asked these same questions by OSI to asked to
16 generate similar to-from memos?

17 A I don't personally know of anybody but I'm --
18 it's always whoever is working that day, whoever is
19 involved in that area writes memos of what's going on.

20 Q Do you remember anybody else working as chart
21 sergeant on January 27th, 2016?

22 A I don't remember. I did the -- only one chart
23 sergeant per shift so I don't know who worked before me
24 or after me.

25 MR. WEISS: Your Honor, I'd ask the Court show

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1 the witness what's been marked as Plaintiff's 29-F not
2 admitted into evidence.

3 THE COURT: Please just show it to the
4 witness.

5 MR. WEISS: If you scroll down. That's good.

6 BY MR. WEISS:

7 Q Lieutenant Conto, do you know what this document
8 is?

9 A It appears to be a memo from Lieutenant Hellihas to
10 Captain Boyd.

11 MR. MIRANDA: Your Honor, this document is
12 hearsay, prepared six months after.

13 THE COURT: It hasn't been offered yet. No
14 one can read from it because it's not in evidence.

15 Q Is this a document that would have been created in
16 the normal course of business?

17 A Yes.

18 Q And is this a document that's maintained by DOCCS
19 and the Office of Special Investigations?

20 MR. MIRANDA: Your Honor, he can't speak to
21 what another agency -- he has no personal. He doesn't
22 work for OSI, he works for DOCCS.

23 THE COURT: Question was, and does this
24 document that's maintained by DOCCS -- and is this a
25 document that's maintained by DOCCS and the Office of

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1 Special Investigations? I will allow him to answer if
2 he knows.

3 A I have no idea what they do with it.

4 BY MR. ROCHE:

5 Q Do you know what DOCCS is -- is this a document
6 that would normally be maintained by the Department of
7 Corrections?

8 A It's a memo. They maintain them for certain amount
9 of years.

10 Q Was this memo prepared around the same date as the
11 memo that you prepared that we were just looking at?

12 A I don't remember when I did mine. I'm not sure.
13 This was six months after the incident. I don't
14 remember when I did mine.

15 Q If I told you that your memo was drafted on
16 July 22nd, 2016, would that refresh your recollection?

17 A Then it would be approximately the same time.

18 Q Were you asked around that time by the Office of
19 Special Investigations to generate that to-from memo?

20 A Yes. I was called in and interviewed down in one
21 of our conference rooms and wanted me to create a memo
22 to -- to write what we discussed.

23 Q Okay. So just to be clear, so when you were asked
24 to generate this memo, you weren't asked to think back
25 to the incident that happened in January of 2016. You

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1 were just -- you had a discussion a few days prior and
2 then were asked to generate this to-from?

3 MR. MIRANDA: Can we clarify what memo we are
4 talking about?

5 THE COURT: What's your objection? Don't talk
6 to counsel. What's your objection?

7 MR. MIRANDA: I guess if we would ask some
8 clarity, I'm not sure.

9 THE COURT: Objection to the form, sustained.
10 Just state your legal objection.

11 MR. MIRANDA: Thank you.

12 BY MR. WEISS:

13 Q Was your memo based on the review of the chart that
14 was -- was your to-from memo based on review of the
15 cheat sheet that you were referring to earlier?

16 A It was through the interview with the OSI
17 investigator. His question and the review of
18 the charts.

19 MR. WEISS: Your Honor, I ask what's been
20 premarked as Defendants' 29-F be moved into evidence.

21 THE COURT: Any objection from Defendant
22 McGrath?

23 MR. MIRANDA: Your Honor, the witness hasn't
24 indicated he has any personal knowledge of this document
25 and he did create it. It's hearsay. It's between two

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1 other individuals.

2 THE COURT: Any objection from Defendant
3 Barnaby?

4 MR. REED: None, only to join the objection of
5 Defendant McGrath.

6 MR. WEISS: Your Honor, if I may, this
7 document has been -- the authenticity has been
8 stipulated and we have now established that it was
9 created contemporaneously to what it describes.

10 THE COURT: How did you prove that it was
11 created contemporaneously?

12 MR. WEISS: The witness testified that this
13 memo was -- that his memo is similar to this one, was
14 created around the same time that they were both
15 interviewed by the Office of Special Investigations
16 regarding the chart that we were previously looking at
17 and that when asked to generate these to-from memos,
18 they weren't asked to remember something from months
19 prior. They were shown the chart just a few days
20 beforehand.

21 THE COURT: Is this a record, sir, that's
22 ordinarily kept in the course of the business of the
23 Bare Hill Correctional Facility?

24 THE WITNESS: This memo wouldn't normally be
25 created.

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1 THE COURT: It would -- it was not normally
2 created?

3 THE WITNESS: No. Not unless there's -- like
4 I said, it's an investigation. OSI must have talked to
5 the lieutenant to have him write something.

6 THE COURT: All right. The objection is
7 sustained.

8 MR. WEISS: Okay.

9 BY MR. WEISS:

10 Q Lieutenant Conto, when an officer at Bare Hill
11 Correctional is assigned to do a frisk at a specific
12 area, is that normally reported in the logbook for that
13 area?

14 A It usually is.

15 Q And according to the DOCCS directives that are in
16 place, a set of rules, is the frisk supposed to be
17 reported in the logbook of that area?

18 A It's common practice to put it in. When you enter
19 the area to do frisking, you are supposed to sign in to
20 the logbook. Embarrassed to say I'm not a hundred
21 percent sure if it's part of the directives that says
22 you have to.

23 Q But it's a normal practice?

24 A Normal practice.

25 Q So would there be any differentiation if the

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1 officer is going to do a frisk of the inmates on the way
2 into an area versus a way out? Would it make a
3 different entry into the logbook?

4 A No, it would just say pat frisking. Just pat
5 frisking and the time that they were there and their
6 names.

7 Q Okay. Hypothetically, an officer assigned to the
8 annex school to do a frisk of the inmates on the way in,
9 then on the annex school block it would say the name of
10 that officer and that they were frisking?

11 A Yes.

12 Q Okay.

13 MR. WEISS: Your Honor, I ask the Court to
14 display what's been admitted into evidence as -- no, if
15 you could display for the witness Plaintiff's 16.

16 COURT CLERK: I have 16 in evidence.

17 THE COURT: Is this 15 or 16 that we are going
18 to show the witness?

19 MR. WEISS: 16 in evidence currently? Okay.

20 THE COURT: Yes.

21 MR. WEISS: Just display then.

22 MR. MIRANDA: Object to the relevance of this
23 line of questioning. The witness doesn't work in the
24 annex at this time.

25 THE COURT: Well, I don't know the relevance

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1 yet, so you can make that objection when I hear a
2 question.

3 MR. WEISS: If the Court would just scroll
4 down a little further. That's good.

5 BY MR. WEISS:

6 Q Lieutenant Conto, upon reviewing this entry and
7 this logbook for the annex school, does it indicate that
8 anybody was doing a frisk that day?

9 A It doesn't appear to be a notation in there.

10 MR. MIRANDA: Was this admitted?

11 THE COURT: Yes. The answer will stand. It
12 doesn't appear to be a notation in there.

13 BY MR. WEISS:

14 Q I'd just like to ask you a couple of questions
15 about frisking generally. At Bare Hill Correctional, is
16 it commonplace -- well, say specifically for the annex
17 school, would it be commonplace to frisk inmates on the
18 way into the annex school in the vestibule of the annex
19 school?

20 A A lot has changed --

21 THE COURT: Just answer the question.

22 A Not normally.

23 Q Why wouldn't that normally be the procedure?

24 A Because you have other inmates walking past and you
25 have congestion in the area. So normally when they walk

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1 into the door area, you identify the inmate that you
2 want to pat frisk and you take them out of that area and
3 pat frisk them in the -- in the part -- it's like a dorm
4 area, but it's a -- it's a open -- more open area. You
5 have more maneuverability as opposed to being in a
6 congestion of the actual doorway.

7 Q How big would you say one of the those vestibules
8 are?

9 A Actual vestibule -- maybe six, six and a half foot
10 by six, six and a half foot. It's not very big. That's
11 why we don't normally pat frisk in the doorway.

12 Q What would be the security or safety concern with
13 having inmates walking directly behind an officer who's
14 trying to pat frisk somebody in the vestibule?

15 A It's all safety. Safety reasons. You don't want
16 somebody walking behind you that could potentially
17 injure the officer or injure the -- you know, take --
18 take a swing at you. I mean, it's -- luckily it doesn't
19 happen a lot but it does happen.

20 Q As a lieutenant, if you saw an officer frisking an
21 inmate in the vestibule while other inmates -- multiple
22 inmates were walking behind him, would you admonish that
23 officer and tell them to do it somewhere else?

24 A Again, it would depend on the situation. Depending
25 on the amount of traffic that's in that area, but as a

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1 rule, we don't -- you don't do it in the area during a
2 run because that's where there's a lot of movement,
3 congestion. One way in, one way out is where you got a
4 lot of traffic.

5 Q And when officers are assigned to frisk locations,
6 have you ever heard of them primarily looking for
7 tobacco?

8 A I don't have any knowledge of that. When I was
9 a area sergeant, they were more concerned about weapons
10 and stuff but they do have limits on amount of tobacco
11 that they are allowed to carry but I -- I don't have any
12 firsthand knowledge of -- specifically for tobacco.

13 Q Fair to say that frisks are typically conducted to
14 find weapons or drugs?

15 A Yes.

16 Q Lieutenant Conto, I just have a quick couple of
17 questions about cube numbers. Can you describe for the
18 jury what a cube number is.

19 A Each dorm has a dorm layout for where we are. It's
20 a dorm layout and they have the dorm -- cubes are number
21 1 through 50. There's ten beds that are double bunked
22 and then each cube there's a Plexiglas screen, and then
23 we have the inmate's name and number, and they put the
24 name and DIN number on the location so you know where
25 each inmate lives or houses or whatever you want.

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1 Q And they keep that chart where each inmate lives at
2 each dorm?

3 A Yes. Each dorm has their own inmate, their -- the
4 dorms are all cut out the same way and they all have the
5 same number of cubes, same number of beds, and if the
6 bed is empty, they will have a -- no name there.

7 Q And, yeah, just to be clear, the cube -- the
8 assigned cube is where that inmate sleeps?

9 A Yes.

10 Q So if, for instance, hypothetically you were given
11 the -- you know, cube number and a dorm letter, like,
12 for example, F-2, would you be able to walk over to that
13 dorm and figure out what inmate was in that specific
14 cube?

15 A Yes.

16 Q And how would you do that?

17 A Well, there's two different ways. With a -- if you
18 have access to the computer and you have the codes, you
19 can pull up the dorm sheet and it would have every
20 inmate that's assigned to that dorm with their bed
21 location.

22 If you go to the dorm itself, you could look on
23 that board and you can go that one, two, three, four --
24 go to whatever bed you're looking for and his name and
25 DIN number will be on that bed.

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1 MR. WEISS: Thank you. One moment. Nothing
2 further, your Honor.

3 THE COURT: All right. Thank you. Any cross
4 by Defendant McGrath?

5 MR. MIRANDA: Yes, your Honor.

6 CROSS EXAMINATION

7 BY MR. MIRANDA:

8 Q Good morning, Lieutenant Conto.

9 A Good morning.

10 Q Thanks for coming. You just testified that you may
11 not want inmates walking behind officers during a pat
12 frisk because of concern for officer safety; is that
13 correct?

14 A Yes.

15 Q And why is that?

16 A Because inmates and injuries -- inmates can -- they
17 can injure you or the person that you are pat frisking,
18 if they have any issues with that inmate as well, but
19 you just -- you get in the habit of watching your back,
20 and it's a safety issue for yourself as well as the
21 people that are involved.

22 Q So, is it your testimony that sometimes inmates are
23 violent at Bare Hill Correctional Facility?

24 A Absolutely.

25 Q What do you mean by "absolutely"?

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1 A We have had -- as a matter of fact, last week --

2 THE COURT: No, that's not relevant, what
3 happened last week. The answer will stand that inmates
4 can be violent in prison.

5 BY MR. MIRANDA:

6 Q Were they violent in January of 2016, to your
7 knowledge?

8 MR. WEISS: Objection. That's a -- objection.

9 THE COURT: That's a very broad question. I
10 will allow you to answer.

11 A There's always incidents that happen. As far as a
12 certain date, I honestly could not give you a yes or no
13 but there is always unusual incidents that is happening.

14 Q Are inmates having drugs and tobacco?

15 THE COURT: Back in the -- back when this
16 claim arose in 2016?

17 MR. MIRANDA: Correct, your Honor.

18 THE COURT: Go ahead.

19 A Yes.

20 Q What kind of drugs were they hiding in tobacco in
21 January of 2016?

22 A It's -- they call it K2 now. I don't know where --
23 exactly it was called back then but it's synthetic
24 marijuana, regular marijuana. They have all kinds of
25 different medical -- different kinds -- I don't know the

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1 exact names of them but there is -- there's a K2 is what
2 they call it now. I don't know exactly what it's called
3 five years ago.

4 THE COURT: Okay. Next question.

5 Q And January of 2016, were you aware of what the
6 effects of K2 were on an inmate?

7 THE COURT: That's irrelevant. Sustained.

8 Q Lieutenant Conto, you testified earlier that you
9 worked a 7-to-3 shift at Bare Hill in January of 2016;
10 is that correct?

11 A Yes.

12 Q And when you were completing a chart as a chart
13 sergeant at Bare Hill at that time, you would complete
14 the chart for any given day the day before?

15 A Yes.

16 Q So, if you were completing the chart for
17 January 28th, 2016, is it fair to say that you likely
18 would have completed it in the morning of January 27th?

19 A Yes.

20 Q And you also testified that there was a host of
21 individuals who were supervisors that had authority to
22 edit that chart; is that correct?

23 A Yes.

24 Q And those individuals were comprised of ranks of
25 captain; is that correct?

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1 A Yes.

2 Q Lieutenant; is that correct?

3 A Yes.

4 Q You said deps. Explain what that means.

5 A Dep of security. He's the -- like one of the
6 superintendents, the highest in the jail, then it goes
7 the dep of security and on down to the dep of
8 administration, dep of programs, dep of captains.

9 Q And sergeants as well have the authority to edit
10 that document?

11 A Yes.

12 Q So, and in January of 2016 how many deps, captains,
13 lieutenants and sergeants were working on a 24 -- over a
14 24-hour period at Bare Hill, to your knowledge?

15 A Approximately 14 people.

16 Q And your shift on January 27th would have ended at
17 approximately 3:00 P.M.?

18 A 2:00. 6 to 2. 7-to-3 shift but we work 6 to 2.

19 Q Is it fair to say that any of those individuals
20 could have edited that chart after you left?

21 A Yes.

22 Q You indicated that chart was located behind you.
23 Is that correct?

24 A Yes.

25 Q Between on your shift on January 27th, 2016, at

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1 this point did you see Justin McGrath touch that chart?

2 A No.

3 Q Did you see him write on that chart?

4 A No.

5 Q You were working on January 28th, 2016?

6 A Yes.

7 Q And you assigned -- strike that.

8 Did Mr. McGrath check in with you to receive his
9 assignment that day?

10 A Yes.

11 Q And what did you indicate to Mr. McGrath when he
12 checked in?

13 A I directed him to go to the annex school to perform
14 pat frisks. Random pat frisks.

15 Q Did you have any reason to believe that Mr. McGrath
16 should have been at the school annex on January 28th,
17 2016?

18 A No.

19 Q And January of 2016, were resource officers
20 regularly assigned to pat frisk at different spots of
21 the Bare Hill Correctional Facility?

22 A Yes.

23 Q Did you socialize with Mr. McGrath in January of
24 2016?

25 A Outside of work, no, I don't know him outside of

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1 work.

2 MR. MIRANDA: Ms. Norton, could we show the
3 witness P-21. Just scroll down a little bit for me.

4 Q There's a column here. What was the word next to
5 training?

6 A Extras. Extra resource officers that are extra for
7 the day that are -- don't have a actual duty.

8 Q How come there's two blank spaces underneath that
9 column?

10 A I can see up above where the -- it's handwritten,
11 those names would have been down below there then some
12 location and the person that has handwritten that was
13 actually down before, called in sick, and they were
14 taken out of the resource role or extra column and put
15 into that to cover that job because the -- the jobs up
16 above have to be filled; the resource guys we don't have
17 to. So we take the extras and put them up and cover
18 those other jobs.

19 Q So there were names there, in those two blank
20 spaces before?

21 A Yes.

22 Q And then the document was edited; is that true?

23 A Yes. Well, I did those because when you take them
24 from here and put them up there, the handwriting up top,
25 like for 14, Charlotte, that's my handwriting. So I

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1 know I took those two guys from down below and stuck
2 them into those two jobs.

3 Q And on the bottom right hand of the chart there's a
4 word above Mr. McGrath's name. Will you read that for
5 the jury.

6 A Extras. That was a -- I ran out of room on that
7 column. I just made another extras. It looks like
8 there might have been one more name above his and one
9 name below his.

10 Q You were shown a document before by plaintiff's
11 counsel to-from memorandum that you authored. Is that
12 true?

13 A Yes.

14 Q Did you author any other memorandums to anybody in
15 the facility about this chart?

16 A I believe it was two memos but I think I said
17 it's five years ago, four years ago, five years ago and
18 my recollection -- I don't remember yesterday.

19 MR. MIRANDA: Your Honor, I'd like to present
20 the witness with a document as rebuttal evidence to
21 refresh his recollection. I have a bunch of copies here
22 that -- I was going to try to do the electronic exhibits
23 for times we're in.

24 THE COURT: It's not rebuttal. You are doing
25 a cross-examination. If there's something that -- if

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1 you develop an answer where he needs to have his memory
2 refreshed, yes, but it is not rebuttal.

3 BY MR. MIRANDA:

4 Q Mr. Conto, did you author another memorandum about
5 this chart?

6 MR. WEISS: Objection; asked and answered.

7 THE COURT: Did somebody just say something
8 over here?

9 MR. WEISS: I said objection. Asked and
10 answered.

11 THE COURT: I didn't hear the answer. Did you
12 author another memorandum about this chart?

13 A I -- I -- the memo itself referred to another memo
14 but, like I said, I don't remember what -- what the
15 first memo that I was reading referred to, this is to
16 elaborate on my prior memo. So I -- I'm assuming I did
17 but I don't recall it.

18 MR. MIRANDA: Would I be able to present him
19 with a document, your Honor, to refresh his
20 recollection?

21 THE COURT: Is it in your evidence binder?

22 MR. MIRANDA: It is not, your Honor.

23 THE COURT: Does the other side have it?

24 MR. MIRANDA: It was in discovery.

25 THE COURT: Let me see it, please.

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1 MR. WEISS: Would we be able to see a copy as
2 well?

3 THE COURT: All of the documents in this
4 folder are the same. Correct?

5 MR. MIRANDA: That's correct.

6 THE COURT: To make sure. All right. I will
7 have Britney mark one. Just hang on a second. I will
8 have Britney mark one of them as the next sequential
9 McGrath exhibit.

10 COURT CLERK: That would be Defendant McGrath
11 Exhibit D-GG.

12 MR. MIRANDA: Correct, Defendant D-GG.

13 COURT CLERK: D-GG.

14 THE COURT: Defense McGrath Exhibit has now
15 been marked as D-GG. Go ahead.

16 BY MR. MIRANDA:

17 Q Sir, do you have that document in front of you?

18 THE COURT: Record will reflect that I'm
19 handing Defendants' D-GG to the witness.

20 Q You have just been handed a document D-GG that's
21 been marked for identification purposes.

22 Would you take a moment to read that document and
23 let me know when you're finished.

24 A (Witness complies). Okay.

25 Q After reading this document, do you remember

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1 creating this?

2 A Not really but, yes, it's my signature. It's one I
3 created.

4 Q Is that your name next to the "from" line?

5 A Yes.

6 Q Is that your signature down at the bottom?

7 A Yes.

8 Q Is this document a true and accurate copy of a
9 memorandum you prepared on June 11th, 2016?

10 A Yes.

11 MR. MIRANDA: Your Honor, we would ask that
12 this document be moved into evidence.

13 THE COURT: Is there any objection to
14 Defendant McGraw GG?

15 MR. WEISS: Your Honor, I don't believe this
16 document was ever exchanged during discovery but we have
17 no objection.

18 THE COURT: All right. Defendant McGrath GG
19 is received.

20 (Defendant's Exhibit McGrath GG, received)

21 MR. MIRANDA: Has that been provided to the
22 jury?

23 THE COURT: We don't have this in electronic
24 version.

25 MR. MIRANDA: I understand.

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1 THE COURT: So, no, we can't.

2 MR. MIRANDA: Okay.

3 THE COURT: Nor did we know we were going to
4 use it because it's not in your evidence submissions.

5 MR. MIRANDA: Understood, your Honor.

6 BY MR. MIRANDA:

7 Q Lieutenant Conto, I'd like to refer your attention
8 to the first sentence of the second paragraph. Could
9 you read that sentence for us.

10 A It says this memo is in response to Investigator
11 Mitchell's request for --

12 Q I'm sorry. The second paragraph.

13 THE COURT: Second paragraph that begins with
14 the word "there" and right into the microphone please.

15 A There have been several occasions where I have had
16 my completed -- my charts completed for the following
17 day shift and when I returned to work the following
18 morning, there was handwritten requests on the charts
19 indicating various tasks to be performed utilizing extra
20 officers as long as it didn't incur overtime.

21 Q When you made that statement in this memorandum,
22 were you referring to the fact that various supervisors
23 in the facility could edit that chart after you left?

24 A Yes.

25 Q And in that sentence you referred to utilization of

—CONTO - CROSS - MIRANDA—

1 extra officers. Was Mr. McGrath, to your knowledge, on
2 January 28th an extra officer?

3 A Yes, he was.

4 Q I'd like to go to the same paragraph, second last
5 sentence. Could you please read that out loud for us.
6 Starting with "I have never."

7 A I have never questioned any reasonable request nor
8 have I ever had to verify authenticity of anything that
9 was written on the charts. I simply followed through
10 and ensured that the tasks requested were completed
11 utilizing the extra officers assigned for that date.

12 Q With respect to the chart P-21 that was presented
13 to you for January 28th, do you have any reason to
14 question the authenticity of that chart?

15 A No.

16 Q And you indicated that that was preferred to as a
17 cheat sheet?

18 A Yes.

19 Q And there was another document that the facility
20 maintained for assignments?

21 A Yeah. They are grids. They are, like, 14 to
22 15 pages long for day shifts. Just makes it easier to
23 have the cheat sheet to keep track of everybody.

24 MR. MIRANDA: No further questions.

25 THE COURT: Any questions on behalf of

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CONTO - REDIRECT - WEISS

1 Defendant Barnaby?

2 MR. REED: Yes.

3 CROSS EXAMINATION

4 BY MR. REED:

5 Q Do you recall working with Sergeant Barnaby at
6 Bare Hill?

7 A Yes.

8 Q Prior to January 28th, 2016?

9 A Yes.

10 Q As of that date, he had only been there a few
11 months, correct?

12 A I don't recall when he got there but we worked
13 together.

14 Q Were you aware he was brand new probationary
15 sergeant?

16 A Yes.

17 Q He didn't work as a chart sergeant at any time on
18 that or prior to that date, did he?

19 A I don't recall if he ever has.

20 Q Did you socialize with Sergeant Barnaby outside of
21 work at that time?

22 A No.

23 MR. REED: Nothing further.

24 THE COURT: Any redirect?

25 REDIRECT EXAMINATION

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CONTO - REDIRECT - WEISS

1 BY MR. WEISS:

2 Q Lieutenant Conto, is it fair to say there's no
3 regular bid for being assigned to frisk at the school
4 annex?

5 A No, that's not a job per se. It's a -- if you have
6 extras, we always keep them thinking. Keep the inmates
7 wondering when we are going to pat frisk them. You
8 always try to catch them off guard so you don't have
9 them -- we are not going to do to today, today is
10 Tuesday.

11 Whenever there's extras and there's resource guys,
12 we always pick a different area. We go to the gym,
13 going out to the yard, we will pat frisk. Go to
14 different locations.

15 Q And last -- did the Office of Special
16 Investigations ever follow up with you and inform you
17 that they couldn't figure out --

18 MR. MIRANDA: Objection, your Honor.

19 THE COURT: You may answer that with a yes or
20 no.

21 A No.

22 MR. WEISS: Can I finish asking the question?

23 THE COURT: What was that?

24 MR. WEISS: I just had a few more words. I
25 just wanted to know if I can repeat my full question.

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1 THE COURT: Sure.

2 BY MR. WEISS:

3 Q Did the Office of Special Investigations ever
4 follow up with you and inform you that they were unable
5 to figure out who wrote that entry assigned to Officer
6 McGrath to frisk the annex school that day?

7 A No.

8 MR. WEISS: Nothing further.

9 THE COURT: Anything else?

10 MR. MIRANDA: Nothing further.

11 THE COURT: If you will reapply your mask,
12 your testimony is concluded and you may leave.

13 (Witness excused)

14 (Pause in proceeding)

15 MR. MIRANDA: Could we be heard outside of the
16 presence of the jury before the next witness is called?

17 THE COURT: Of course. Who is the next
18 witness?

19 MR. WEISS: I believe the next witness is
20 Stacy Weir.

21 THE COURT: Okay.

22 MR. MIRANDA: It can wait, your Honor.

23 THE COURT: Okay.

24 MR. WEISS: Your Honor, may I ask this time to
25 provide Stacy Weir with the questionnaire? I don't

~~WEIR - DIRECT - WEISS~~

1 believe she's received it yet.

2 THE COURT: Yes. Absolutely.

3 MR. WEISS: Thank you, your Honor.

4 (Pause in proceeding)

5 THE COURT: The record will reflect that the
6 last witness, Sergeant Conto, chose not to wear his mask
7 during his testimony, which was his right.

8 COURT CLERK: Would you please raise your
9 right hand and state your full name for the record
10 please.

11 THE WITNESS: Stacy Weir.

12 S T A C Y W E I R , having been duly sworn, was
13 examined and testified as follows:

14 THE COURT: Good morning. I'm letting
15 witnesses know that it's entirely up to you as to
16 whether you'd like to keep your mask on or if you'd like
17 to take it off to testify. No matter what you do,
18 please use the microphone and keep your voice up.

19 THE WITNESS: Okay.

20 THE COURT: You may proceed.

21 MR. WEISS: Thank you, your Honor.

22 DIRECT EXAMINATION

23 BY MR. WEISS:

24 Q Good morning, Ms. Weir.

25 A Good morning.

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~~WEIR - DIRECT - WEISS~~

1 Q What do you do for a living?

2 A I am a forensic scientist at the New York
3 State Police Forensic Investigation Center in Albany,
4 New York.

5 Q And how long have you been doing that?

6 A Since January of 2007, so about 13 and a half
7 years.

8 Q Can you briefly describe what you do as a forensic
9 scientist.

10 A As a forensic scientist, I examine items of
11 evidence that are submitted to the laboratory. I
12 perform serology, which is where we look for the
13 possible presence of biological fluids on an item of
14 evidence, such as blood or seminal fluid, and I also
15 perform DNA analysis.

16 Q Did there ever there come a time that you worked in
17 your capacity as a forensic scientist on a case
18 involving a Joseph Tranchina?

19 A Yes, I did.

20 Q And do you remember around when that was?

21 A I think it was in March of 2016.

22 Q And what was your role in that case?

23 A In that case, I was a forensic scientist that
24 performed analysis on a Plexiglas shank that was
25 submitted and a buccal swab collection kit from

~~WEIR - DIRECT - WEISS~~

1 Joseph Tranchina.

2 I performed serology and DNA analysis on the
3 Plexiglas shank and DNA analysis on the buccal swab.

4 Q Just to be clear, would it be fair to call a buccal
5 swab, like, a cheek swab?

6 A Yes, that's what it is. A swab that is collected
7 from the inside of the cheek.

8 Q Now, what if any information were you given about
9 what had happened in that incident before you started
10 working on your analysis?

11 A The submission paperwork that I received just
12 stated that a weapon was found on an inmate.

13 Q Do you remember what that Plexiglas shank, as you
14 described it, looked like?

15 A It was a triangular-shaped clear piece of
16 Plexiglas.

17 Q And what if any effect does the shape of the object
18 have on your testing?

19 A I separated the item into two sections to collect
20 swabs from it. So I refer to one end as a pointed end
21 and one end as a handle-type end, but it doesn't affect
22 my analysis. It's just basically how I separated the
23 item to conduct my testing.

24 Q And can you just briefly describe the process that
25 you were asked to go through or that you went through in

~~WEIR - DIRECT - WEISS~~

1 analyzing this piece of Plexiglas.

2 A I was assigned by my supervisor to swab the piece
3 of Plexiglas, test those swabs for the possible presence
4 of blood, and then perform DNA analysis on the swabs.

5 Q And was there any blood found on the Plexiglas?

6 A No. The presumptive screening test was -- did not
7 detect any possible presence of blood.

8 Q Can you take us through your DNA analysis of the
9 Plexiglas.

10 A For DNA analysis, I collect swabs. They're sort of
11 like a Q-Tip but a bit longer, a wooden stick on them.
12 I take a cutting from that swab, majority of the cotton
13 goes into a small tube and chemicals, reagents are added
14 to that substrate or that piece of cotton swab, and
15 those reagents are meant to remove any cellular material
16 that's on the swab, break those cells open and verify so
17 that only DNA is left behind.

18 After that extraction process is what's that
19 referred to, I perform quantitation to see how much DNA
20 is present on that item, and then after that,
21 amplification is performed in order to target specific
22 regions for testing the DNA, and then a profile is
23 generated after running it through a genetic analyzer,
24 and that's data that I then analyze, interpret, and
25 write a report from my findings.

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~~WEIR - DIRECT - WEISS~~

1 Q Was DNA recovered from the Plexiglas that allowed
2 you to create a full profile?

3 A Yes. There were DNA profiles present on the two
4 sets of swabs that I collected. One from the pointed
5 end and one from the handle end.

6 Q Can you briefly describe what you mean by the
7 profiles or can you describe the profiles that were
8 recovered from the Plexiglas?

9 A So, my conclusion for those two profiles, they were
10 both mixture profiles that were consistent with DNA from
11 an unknown male donor, John Doe, and mixed with DNA from
12 at least two additional donors with John Doe being the
13 major contributor.

14 Q Why were you unable to not make a profile of the
15 minor contributors?

16 A In mixture profiles or mixtures where there's more
17 than one person's DNA present on an item, when it gets
18 beyond two to three donors and above that, the remainder
19 of the profile that isn't the major contributor can be
20 very complex and also very low information to make any
21 conclusions on.

22 So a major contributor is determined by doing a
23 mathematical calculation of the peak -- peak heights
24 that are present because a DNA profile kind of looks
25 like an EKG with peaks in it. So the major is

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WEIR - DIRECT - WEISS

1 determined by looking at whether there's a three-to-one
2 ratio of DNA there compared to the rest of the profile.

3 So basically once there's a major determined in a
4 mixture, such as a case like this, the remainder of the
5 profile or the minor contributors become too
6 insufficient to make any further comparisons to.

7 Q Was there anything abnormal about testing this
8 Plexiglas?

9 A No. Everything went as usual for this type of a
10 case.

11 Q Any issues you encountered during the process?

12 A No, I didn't have any.

13 Q During the testing, what if any steps were taken to
14 control for any possible human error?

15 A Well, throughout our testing, we have many
16 different controls for positive and negative controls.
17 So positive controls make sure that our processes are
18 working the way they are supposed to, and the negative
19 controls make sure that no contamination occurred
20 throughout the process.

21 Q What was the result of your test -- your DNA
22 testing of the Plexiglas?

23 A So, the DNA conclusion, again, was that the mixture
24 profiles from the swabs from the handle end and the
25 swabs from the pointed end of the Plexiglas shank are

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~~WEIR - CROSS - BLENK~~

1 consistent with the DNA from an unknown male donor John
2 Doe and mixed with DNA from at least two additional
3 donors with a major contributor being John Doe, and
4 Joseph Tranchina can be excluded as being the major
5 contributor of DNA to these mixture profiles.

6 And due to insufficient genetic information, no
7 further comparisons can be made to the minor
8 contributors to the profiles.

9 Q Now, in terms of Mr. Tranchina being excluded as
10 being the major donor of the DNA that was on the
11 Plexiglas, what -- do you know what the statistical
12 accuracy of that result is?

13 A There's no statistical calculation performed in our
14 cases when it's an exclusion, only when there's an
15 inclusion. So I didn't perform any statistics for this
16 case.

17 Q Were you given samples of anybody else's DNA to see
18 if that matched the DNA that was on Plexiglas?

19 A No, I wasn't.

20 MR. WEISS: Nothing further.

21 THE COURT: Cross-examination by counsel for
22 Defendant McGrath?

23 MR. BLENK: Yes, your Honor. Thank you.

24 CROSS EXAMINATION

25 BY MR. BLENK:

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~~WEIR - CROSS - BLENK~~

1 Q Thank you for being here today. We previously met
2 when you had a deposition of a few months ago but it's
3 nice to see you again.

4 A Yes, you too.

5 Q My name is JP Blenk, I represent Justin McGrath.

6 When -- so, just to clarify, you found DNA from
7 three different individuals on that weapon; is that
8 correct?

9 A At least three. So it could be more than three.

10 Q Okay. It could be more than three and you
11 didn't -- you weren't able to confirm that Mr. Tranchina
12 was not one of those other two individuals. Correct?

13 A Right. There's no comparisons that I can make to
14 the minor contributor, so there's no conclusion made
15 other than that I can't make comparisons.

16 Q Okay. And did anybody tell you where the weapon
17 was found?

18 A So, the submission paperwork that I received said
19 that a weapon was found on an inmate. I did testify in
20 an arbitration hearing for this case back in December
21 of 2016, and I believe the attorney involved in that
22 case --

23 MR. BLENK: That's hearsay.

24 THE COURT: The latter portion of that answer
25 is stricken but narrow down your question.

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~~WEIR - CROSS - BLENK~~

1 Q At the time you completed your report, nobody had
2 informed you where the weapon had been found; is that
3 correct?

4 A Not specifically, just on an inmate.

5 Q Okay. And if it had been important, you would have
6 asked for that information before preparing the report?

7 A I'm sorry. Can you repeat that?

8 Q If it had been important for you to know that, you
9 would have asked for that information before preparing
10 your report?

11 A Yes. I generally just use what's in the submission
12 paperwork, and I don't tend to ask for more information.

13 Q So nobody told you who had handled the weapon
14 before it got there?

15 A I think the labeling on the packaging had a
16 recovered by CO Justin McGrath written on it.

17 Q I think you testified that there wasn't blood found
18 on the actual weapon; is that correct?

19 A Yes. My testing for blood did not detect any.

20 Q And so compared to other possible conveyances for
21 DNA, like sweat and skin, blood would be more likely
22 to -- would be more likely to result in positive DNA
23 results; is that correct?

24 MR. WEISS: Objection, your Honor.

25 THE COURT: Overruled. You may answer.

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1 A In general, bodily fluids such as blood do leave
2 more DNA, depending on the item, than just touching it
3 or sweating on it, yes.

4 Q You don't know if -- if Inmate Tranchina -- if
5 Mr. Tranchina had touched the shank, right?

6 A I do not know, no.

7 Q And you can't rule out that Mr. Tranchina was one
8 of the two minor DNA contributors?

9 A I can't make any comparisons to the minor
10 contributors at all.

11 MR. BLENK: Thank you. No further questions.

12 THE COURT: Any questions on behalf of
13 Defendant Barnaby?

14 MR. ABEL: No question, your Honor.

15 THE COURT: Thank you. Any redirect?

16 MR. WEISS: No, your Honor.

17 THE COURT: Thank you. You may step down.
18 That concludes your testimony.

19 (Witness excused)

20 THE COURT: Who is the plaintiff's next
21 witness?

22 MR. ROCHE: Our next witness is Maura Mayer.

23 THE COURT: We have been advised that she will
24 be here at 1:00. Good time to break.

25 Members of the jury, we are going to take our

1 lunch break now. During this break, please do not
2 discuss this case amongst yourselves or with anyone else
3 and continue to follow all of the instructions I've
4 given you. Thank you.

5 (Jurors excused)

6 THE COURT: Mr. Miranda, was there something
7 that you wanted to put on the record before this coming
8 witness?

9 MR. MIRANDA: No, your Honor.

10 THE COURT: All right. What witness are you
11 concerned about?

12 MR. MIRANDA: Only to the extent that
13 plaintiffs were going to call -- I'm not sure if it's
14 Sergeant but Joseph Danussi, D-a-n-u-s-s-i. I
15 understand he's here with Lieutenant Conto.

16 THE COURT: So Sergeant Danussi is on the
17 plaintiff's witness list. Are you intending to call?

18 MR. ROCHE: Your Honor, we decided not to call
19 him.

20 THE COURT: So no concerns. After Miss Mayer,
21 how many other witnesses do you have before you rest?

22 MR. ROCHE: I believe that we will rest after
23 Miss Mayer.

24 THE COURT: Okay. So be ready to go with any
25 defense testimony.

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1 I've looked at the testimony of Officer
2 Laramay that Defense McGrath wants to read. Have you
3 given them a highlighted copy?

4 Here's what I'm going to say about that. Most
5 of what's highlighted is already in the record. It's
6 about Plexiglas being available in the prison. We have
7 had testimony to that effect. It's about court officers
8 being concerned about tobacco and drugs. That's already
9 in the record. While I think the reading is cumulative,
10 I will give you the lunch hour to take a look at it and
11 did you want to say something?

12 MR. ROCHE: Yes, I would like to say
13 something. Sergeant or Lieutenant Laramay was the -- I
14 think the watch commander on the date of the incident.
15 He was on duty on the date of the incident and he isn't
16 a material witness but we should be able to have an
17 opportunity to cross-examine him. He's not unavailable.
18 He's an employee of DOCCS. He should be -- he should
19 honor his subpoena that was served on him.

20 THE COURT: Believe me, I know he should honor
21 the subpoena. You know, I'm a practical judge, and I'm
22 trying to keep this case moving. Maybe after you take a
23 look at what it is they want to read, it is possible you
24 may withdraw your objection. Review what they want to
25 read over the lunch hour, it's not a lot, and then we

1 will talk again. All right?

2 I understand what you're saying, I will be --
3 if I allow this testimony to be read, I will be speaking
4 to Officer Laramay, I will be speaking to the Attorney
5 General, and I will be speaking to Officer Laramay's
6 immediate supervisor because this is -- as I said, this
7 notion that I got a subpoena and I don't feel like
8 coming is totally unacceptable to the Court.

9 Let me be clear, if I do allow this to be
10 read, I'm not exonerating Officer Laramay because what
11 he is doing is unacceptable but read it and see if you
12 have any objection.

13 MR. ROCHE: Thank you, your Honor.

14 THE COURT: We're in recess until 1:00 P.M.

15 (Following recess)

16 THE COURT: Plaintiff may call their next
17 witness. Let's get the jury, please.

18 MR. ROCHE: Plaintiff calls Miss Mayer.

19 (Discussion held off the record)

20 (Jurors enter courtroom, 1:04 P.M.)

21 THE COURT: Be seated, everyone.

22 Members of the jury, we are just getting the
23 witness from the hallway. We will be ready to begin in
24 just one moment.

25 COURT CLERK: Miss Mayer, would you please

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~~MAYER - DIRECT - ROCHE~~

1 raise your right hand and state your full name for the
2 record.

3 THE WITNESS: Maura Mayer.

4 M A U R A M A Y E R , having been duly sworn, was
5 examined and testified as follows:

6 THE COURT: Miss Mayer, I have given each
7 witness a choice as to whether to testify with the mask
8 or without the mask. It's entirely up to you.

9 THE WITNESS: I will take it off.

10 MR. ROCHE: May I inquire, your Honor?

11 THE COURT: Yes.

12 DIRECT EXAMINATION

13 BY MR. ROCHE:

14 Q Good afternoon, Miss Mayer.

15 A Hi.

16 Q Do you currently live with Justin McGrath?

17 A I do.

18 Q And for how long have you lived with him?

19 A April 2016.

20 Q And you were subpoenaed to testify here today,
21 correct?

22 A I was.

23 Q At some point, were you employed by New York State
24 as a corrections officer?

25 A Yes.

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~~MAYER - DIRECT - ROCHE~~

1 Q Okay. And when was that?

2 A August 24th, 2015, to sometime in June 2016.

3 Q And were you terminated? Was your employment
4 terminated in June of 2016?

5 A It was.

6 Q And was it terminated in connection with an
7 incident involving Joseph Tranchina?

8 A I was a probationary officer, and I was never
9 actually given a reason for my termination. A specific
10 reason.

11 Q Was it your understanding that you were not
12 continued as a correction officer, was it your
13 understanding that that decision was related to the
14 incident with Joseph Tranchina?

15 A Yes.

16 Q Did you work for a time at Bare Hill Correctional
17 Facility?

18 A I did.

19 Q And was that from August 2015 to the end of
20 January 2016?

21 A No.

22 Q When was it?

23 A I -- after I got out of the academy, I was at
24 Wende Correctional Facility, and then from there I was
25 at Bare Hill.

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~~MAYER - DIRECT - ROCHE~~

- 1 Q So approximately when did you arrive at Bare Hill?
- 2 A Roughly the fall.
- 3 Q Fall of 2015?
- 4 A Yes.
- 5 Q Okay. And then you transferred out of Bare Hill at
- 6 the very end of January 2016, correct?
- 7 A I did.
- 8 Q Okay. And you transferred to Willard Correctional
- 9 at the end of January, right?
- 10 A I did.
- 11 Q Okay. And you had requested that transfer, right?
- 12 A Yes.
- 13 Q And approximately two weeks after you arrived at
- 14 Willard, you requested a transfer back to Bare Hill.
- 15 Correct?
- 16 A I don't think it was two weeks.
- 17 Q Well, if -- would it be fair to say that you -- in
- 18 mid-February of 2016 you put in a request to transfer
- 19 back to --
- 20 A Yes.
- 21 Q From Willard to Bare Hill?
- 22 A Yes, that sounds about right.
- 23 Q The reason that you put in that request was to be
- 24 closer to Mr. McGrath. Is that fair to say?
- 25 A It was.

~~MAYER - DIRECT - ROCHE~~

1 Q When you started at Bare Hill in 2015, in the fall
2 of 2015, did you know Justin McGrath?

3 A I did.

4 Q So you met him while you were colleagues at
5 Bare Hill?

6 A Yes.

7 Q And at some point while you were assigned to
8 Bare Hill, you started dating Justin McGrath, correct?

9 A I wasn't dating him at that time.

10 Q Is there a -- is it fair to say you became
11 romantically involved with him while you were at
12 Bare Hill?

13 A Not when I was at Bare Hill.

14 Q So when -- pursuant to an OSI investigation, you
15 gave testimony and question-and-answer session in May of
16 2016. Correct?

17 A Yes.

18 Q And you gave another follow-up Q and A in June of
19 2016. Correct?

20 A I only had one Q and A.

21 Q Okay. Well, in May of 2016 you met with
22 investigators from Office of Special Investigations.
23 Correct?

24 A Yes.

25 Q And during that Q and A, you swore to tell the

~~MAYER - DIRECT - ROCHE~~

1 truth, right, in that -- for that Q and A?

2 A Yes.

3 Q Your testimony was under oath?

4 A Yes.

5 Q Okay. And during the Q and A, were you asked this
6 question and did you give this answer? And I'm
7 referring to page 12 line 5, it's Bates number 549.

8 MR. MIRANDA: Your Honor, is this in evidence?

9 THE COURT: It doesn't have to be in evidence
10 if it's going to be used solely for impeachment. What
11 is read from will be admitted for the purpose of the
12 impeachment, if indeed it is impeachment. I don't know
13 yet.

14 BY MR. ROCHE:

15 Q So, Miss Mayer, were you asked this question and
16 did you give this answer:

17 "QUESTION: When did you start dating Officer
18 McGrath?

19 "ANSWER: Maybe, like, I don't know. We started
20 talking maybe, like, right after Christmas, New Year's
21 Eve."

22 Did you give that answer for that question?

23 A I did.

24 Q And were you also asked this question and did you
25 give this answer? This is from the second deposition

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~~MAYER - DIRECT - ROCHE~~

1 transcript, page 11, line 7, Bates number 587.

2 Were you asked this question? Did you give this
3 answer:

4 "QUESTION: And you have lived together since
5 April. You have been continuously dating, you said, for
6 how long? How long have you been dating for?

7 "ANSWER: December."

8 Did you give that answer to that question?

9 A I did.

10 Q So is it fair to say you broke up with or you broke
11 up with Mr. McGrath at some point after you started
12 dating?

13 A We never broke up.

14 Q It's fair to say that when you transferred to
15 Willard, you were going through a breakup, a breakup
16 situation with Mr. McGrath at that time?

17 A Absolutely not.

18 Q Okay. Now, also in relation to your incident with
19 Mr. Tranchina, there was a state investigation, state
20 police investigation. Correct?

21 A Yes.

22 Q And you were interviewed by an Investigator David
23 Hart of the New York State Police on May 11th, 2016?

24 A I don't know the exact date, but, yes.

25 Q And isn't it true that you told Investigator Hart

~~MAYER - DIRECT - ROCHE~~

1 that you and Mr. McGrath were going through a breakup
2 when you requested a transfer?

3 A I never told him that we broke up.

4 Q Okay.

5 MR. ROCHE: So I ask that the witness be
6 shown -- it's Plaintiff's Exhibit 34 I believe. I would
7 ask to scroll down to page 94 through 96.

8 COURT CLERK: This is not in evidence.

9 MR. MIRANDA: Your Honor, we had a prior
10 ruling on this exhibit.

11 THE COURT: This is not in evidence. Correct?
12 It's going to be shown to the witness. I don't know
13 where this is going yet, but when you do and I do, if
14 you have a legal objection, please make it. Right now
15 all I know is the witness is being asked to look at a
16 document.

17 COURT CLERK: Mr. Roche, 94?

18 MR. ROCHE: Okay. Yes.

19 BY MR. ROCHE:

20 Q Miss Mayer, do you recognize this document?

21 A I do not.

22 Q Okay. So I'm going to --

23 MR. ROCHE: Actually, can you go up a little
24 bit more?

25 Q So this is -- what's shown on the screen right now,

~~MAYER - DIRECT - ROCHE~~

1 do you see your name as person interviewed?

2 A I do.

3 Q Okay. So would you agree that this is a report
4 concerning an interview of you by New York State Police
5 in May of 2016?

6 A Yes.

7 Q I ask that we scroll down now to page 3 of that
8 document.

9 THE COURT: I'm not going to let you read from
10 it so I really don't know what you're doing.

11 Q Miss Mayer, I would ask that you read from this
12 document, about halfway through -- halfway down the
13 first paragraph where it states -- directing your
14 attention to the sentence that begins Mayer stated.

15 MR. MIRANDA: Objection, your Honor. This
16 isn't a document that's authored by Miss Mayer, and
17 based on your prior ruling, it's not in evidence and
18 should therefore not be read.

19 THE COURT: It's not in evidence and I don't
20 recall the witness saying that she lacks recollection.
21 I don't know what you're trying to do with the document.

22 BY MR. ROCHE:

23 Q Well, does this document refresh your recollection
24 as to what you said?

25 A I have never seen this document.

~~MAYER - DIRECT - ROCHE~~

1 Q Okay. But can you read the line that begins Mayer
2 stated and tell me whether that sentence refreshes your
3 recollection as to what you told Investigator Hart.

4 THE COURT: Read it to yourself, please.

5 A Just that sentence? That small sentence?

6 Q Okay. That sentence and the following sentence.

7 A Okay.

8 (Pause in proceeding)

9 A Okay. I read it.

10 Q Okay. And does that refresh your recollection that
11 you told Investigator Hart that you were going through a
12 breakup at the time you transferred to Willard?

13 MR. MIRANDA: Objection, your Honor.

14 THE COURT: Overruled. You may answer. She
15 testified that she didn't -- was not undergoing a
16 breakup. She was asked if something would refresh her
17 recollection. She read it silently and now she may
18 answer the question.

19 A Justin McGrath and I never broke up.

20 Q Okay. My question was: Does that refresh your
21 recollection as to what you told Investigator Hart?

22 A I never said that. That is not why I went to
23 Willard.

24 Q At some point you were placed on administrative
25 leave --

~~MAYER - DIRECT - ROCHE~~

1 A Yes.

2 Q -- with regard to the incident with Mr. Tranchina,
3 correct?

4 A Yes.

5 Q Okay. And at the time you were on administrative
6 leave, Mr. McGrath was also on administrative leave at
7 the same time. Correct?

8 A Yes. I -- they overlapped.

9 Q Okay. And it was a condition of your -- both of
10 your administrative leave at that time that you had to
11 stay at home. Is that fair to say?

12 A Yes.

13 Q And during that time, did you discuss with
14 Mr. McGrath the facts of the case, of each of your cases
15 involving Mr. Tranchina?

16 A No. I was advised to talk to the union and my
17 lawyer and not anybody else.

18 Q So you and Mr. McGrath never talked to each other
19 about each of your, basically, suspensions due to
20 incidents involving Mr. Tranchina?

21 A No. I listened to my lawyer.

22 Q So back in January of 2014 at specifically --
23 Back in January 2014 or 2016 -- sorry, before you
24 were transferred to Willard, what was your assignment at
25 Bare Hill?

~~MAYER - DIRECT - ROCHE~~

1 A I was a resource officer.

2 Q Were you assigned to any particular location at
3 that time?

4 A I just worked multiple dorms.

5 Q Okay. Would it be fair to say you worked at --
6 pretty often at dorm F-2?

7 A I worked at many dorms.

8 Q Were you ever assigned to the F-2 dorm during that
9 time period?

10 A Yes.

11 Q And was Joseph Tranchina housed in the F-2 dorm at
12 that time?

13 A Yes.

14 Q And do you recall what was the designation or the
15 number of his assigned cubical at that time?

16 A I do not.

17 Q From the time you -- you started in F-2 or you
18 first went to F-2 to January 24th of 2016, which is your
19 last day. Correct?

20 A Yes.

21 Q With what frequency would you engage with
22 Mr. Tranchina at some type of communication?

23 A No more than any other inmate on the dorm.

24 Q And were any of the communications you had with him
25 a -- would you consider them a violation of rules for

~~MAYER - DIRECT - ROCHE~~

1 correction officers?

2 A No.

3 Q And would any of the interactions you had with him,
4 would you consider them to be violations of conduct for
5 an inmate?

6 A His conduct?

7 Q Yes.

8 A I mean, he would ask me for supplies that he wasn't
9 allowed to get at that time. So -- and I would just
10 tell him to go back to his cube.

11 Q During that time period, were you dating
12 Mr. McGrath?

13 A I was not.

14 Q Were you in contact with him at that time?

15 A I had met him a couple of weeks before I left to go
16 to Willard.

17 Q So had you met him in -- on New Year's Eve of 2015?

18 A No, and I did say that. I met in December and at
19 the time of the questioning, I -- it had been four
20 months since the incident and anyone that's in a
21 relationship, I don't think you remember specifically
22 when you meet them but I remember that I met him right
23 before I left because I was like, oh, you know, I was
24 interested in him.

25 Q It's fair to say that you told the investigator

~~MAYER - DIRECT - ROCHE~~

1 that you met him in -- on New Year's Eve. Right?

2 A I said sometime after that and I was also being
3 questioned trying to save my job that I cared about and
4 I was upset, and when you're being asked --

5 THE COURT: Just a moment. Just going to take
6 a minute. I'm just going to ask you to center on the
7 question that's asked and just answer the question. If
8 you ever need a break, just let me know and we will take
9 a break, but just listen to the question and do your
10 best to answer the question directly. Go ahead and put
11 a question to the witness, please.

12 BY MR. ROCHE:

13 Q During this time period in January 2016, prior to
14 you being transferred out to Willard, did you have
15 communication with Mr. McGrath during that time?

16 A Can you please repeat that? I'm sorry.

17 Q During the month of January up to January 24th,
18 which was your last day, were you in communication with
19 Mr. McGrath during that time?

20 A Yeah, we were probably texting here and there.

21 Q Would he come up to visit you and -- and at your
22 assigned dorm from time to time?

23 A No.

24 Q So is it your testimony that Mr. McGrath never
25 visited you in the F-2 dorm?

~~MAYER - DIRECT - ROCHE~~

- 1 A He did a fire drill, that's how I met him.
- 2 Q But he never visited you personally on any other
- 3 occasion?
- 4 A No, I was -- I only worked there for a couple more
- 5 weeks.
- 6 Q On your last day at Bare Hill, did you receive a
- 7 note from Mr. Tranchina?
- 8 A I did.
- 9 Q And did you accept it?
- 10 A I did.
- 11 Q And did you take any administrative steps regarding
- 12 that note?
- 13 A Not administrative.
- 14 Q What did the note say, as best you can recall?
- 15 A I mean, it was four years -- over four years ago.
- 16 That I was pretty, to contact him when he gets out.
- 17 Q Would you consider a note like that being passed
- 18 from an inmate as a violation of the prison rules?
- 19 A Yes.
- 20 Q Okay. And that's something that an inmate would be
- 21 written up for, right?
- 22 A Yes.
- 23 Q Okay. And did you report -- did you file an
- 24 infraction against him?
- 25 A I did not write a ticket.

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~~MAYER - DIRECT - ROCHE~~

1 Q Okay. And did you report him to -- did you report
2 the incident to any of your supervisors?

3 A Not my supervisors.

4 Q Did you tell Mr. McGrath about it?

5 A I mentioned it like -- you know, an inmate give me
6 a note. This is -- you know, this is annoying.

7 Q What did you do with the note?

8 A I threw it out.

9 Q You didn't make a copy of it before you threw it
10 out?

11 A No.

12 Q So did Mr. McGrath ask you who the inmate was?

13 A No.

14 Q Did you -- did you tell him who the inmate was?

15 A I might have mentioned like, you know, bed five,
16 bed seven, but no name.

17 Q Okay. Fair to say that it would be pretty easy for
18 Mr. McGrath to find out who the inmate was from that
19 information?

20 A I have no idea how he would be able to find that
21 out.

22 Q Is it fair to say that inside the dorm there's a
23 list of all the inmates and their cube numbers? Right?

24 A Honestly, I can't remember -- recall. I have had
25 different jobs since then.

~~MAYER - DIRECT - ROCHE~~

1 Q So you don't have any recollection of whether there
2 was a sheet or a --

3 A There -- yeah, there --

4 THE COURT: Just a moment. One at a time.
5 Finish that question, please.

6 Q And you don't have any recollection of whether
7 there was any sheet of paper posted in the dorm
8 indicating what inmates were in each cube?

9 A There has to be a -- because it's a prison.

10 Q So would it be -- would you agree that if you
11 were --

12 A Yes.

13 Q If you were to -- let me finish the question. If
14 you were to give -- tell Mr. McGrath the cube number of
15 the inmate, he would be able to go and look at that list
16 and determine who -- the identity of the inmate. Fair
17 to say?

18 A No.

19 Q And why would that not be?

20 A Because in a prison, the dorm is not just an open
21 door where you can just walk in and out. You couldn't
22 just go in and say, hey, I want to see the list of the
23 inmates here.

24 Q So you are saying that Mr. McGrath would not have
25 been able to get access to the F-2 dorm?

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~~MAYER - DIRECT - ROCHE~~

1 A I have no idea when he would be able to or what his
2 job was or what it entailed. I had barely known him.

3 Q But you said that he was a fire officer, right?

4 A I did.

5 Q Okay. So a fire officer would have access to the
6 dorms, correct?

7 A I have no idea what -- what -- how often they can
8 go in. Is it just a fire drill? Is it monthly? I
9 don't know.

10 Q But it's fair to say if he -- if he did manage to
11 get into the dorm to look at that list, he would be able
12 to tell who the inmate was based on the cube number,
13 right?

14 A I honestly do not know.

15 Q When, if ever, did you learn that there was a force
16 incident between Mr. McGrath and Mr. Tranchina?

17 A When he got locked out.

18 Q What do you mean by "when he got locked out"?

19 A On the administrative leave.

20 Q When was that?

21 A May, I believe. May 2016 I think.

22 Q Okay. So it's your testimony that between January
23 of 2016 when the incident occurred and May 2016 when he
24 was locked out, he never told you that he had an
25 incident with Mr. Tranchina?

~~MAYER - DIRECT - ROCHE~~

1 A No.

2 Q And is it your testimony that during that same time
3 period you never told him that you were being
4 investigated with regard to an incident involving
5 Mr. Tranchina?

6 A Like I said, the lawyer told me to talk to the
7 lawyer and the union.

8 Q And is it your testimony, then, for approximately
9 four months or so neither of you knew that the other one
10 had an incident with Mr. Tranchina?

11 A When he got locked out or when he was put on
12 administrative leave they said the name.

13 Q That was the first time you heard the name?

14 A Yes.

15 Q And at that point did you say to -- did you tell
16 Mr. McGrath that you had an incident with the same
17 inmate?

18 A No.

19 Q So fair to say that when you got transferred back
20 to Bare Hill from Willard, you moved in with Mr. McGrath
21 right away. Right?

22 A I did.

23 Q But yet you -- you said you weren't even dating him
24 prior to January of -- prior to the end of January 2016?

25 A That's correct.

~~MAYER - CROSS - MIRANDA~~

1 MR. ROCHE: I've got nothing further.

2 THE COURT: All right. Thank you. Any
3 cross-examination on behalf of Defendant McGrath?

4 MR. MIRANDA: Yes, your Honor. It will be
5 brief. Can I just have a minute to confer.

6 THE COURT: Of course.

7 MR. MIRANDA: Thank you, your Honor.

8 (Pause in proceeding)

9 CROSS EXAMINATION

10 BY MR. MIRANDA:

11 Q Good afternoon, Miss Mayer.

12 A Good afternoon.

13 Q When did you return to the Bare Hill Correctional
14 Facility from Willard?

15 A April 2016.

16 Q So was it at that point that you moved in with
17 Mr. McGrath?

18 A It is.

19 Q You testified earlier that you worked on the F-2
20 dorm at Bare Hill?

21 A Yes.

22 Q Before -- and you were familiar with Mr. Tranchina
23 when you worked on the F-2 dorm?

24 A No more than any other inmate.

25 Q But you knew who he was at that time?

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~~MAYER - CROSS - MIRANDA~~

1 A Yes.

2 Q Correct? When you were at Bare Hill in December or
3 January of 2016, did Mr. Tranchina ever give you pens?

4 A No.

5 Q Did you ever, in December or January of 2016, bring
6 Mr. Tranchina snacks from the commissary?

7 A Absolutely not. I have never been in the
8 commissary room.

9 Q In January of 2016, did you ever kiss
10 Mr. Tranchina?

11 A Absolutely not.

12 Q Did you ever attempt to kiss Mr. Tranchina?

13 A No.

14 Q Did you ever put your hands on Mr. Tranchina in
15 January of 2016?

16 A No.

17 Q For the purposes of performing your duties?

18 A No.

19 Q Did you ever do it in a sexual way at all?

20 A Absolutely not.

21 Q On January 24th, were you passed a note by
22 Mr. Tranchina?

23 A I was.

24 Q And what was your reaction when you received that
25 note?

~~MAYER - CROSS - MIRANDA~~

1 A I was letting out the other inmates to go to
2 programs or to the yard, and he just handed it to me so
3 put it in my pocket and was going to deal with it later.

4 Q How come you didn't look at it right away?

5 A I was letting inmates out of a secure dorm, that is
6 my responsibility. They get out.

7 Q And you came to look at that note that day?

8 A I did after.

9 Q And do you remember what the substance of that note
10 was?

11 A Just that I was -- you know, pretty, contact me
12 when I get out. Along those lines.

13 Q And how did receiving that note make you feel?

14 A Angry.

15 Q Why?

16 A Because being a female officer in a -- in a prison
17 that is predominantly male employees, something like
18 that is just going to make my work life hard.

19 Q Did you write Mr. Tranchina up for that?

20 A I did not.

21 Q Why not?

22 A Because it was my last day at the facility, and
23 I -- I asked my senior officer his advice and he told me
24 to throw it away.

25 Q Did Mr. McGrath learn that the inmate passed you a

~~MAYER - CROSS - MIRANDA~~

1 note before January 28th, 2016?

2 A I had mentioned it probably after my last day that
3 I got a note from an inmate.

4 Q And what was Mr. McGrath's reaction?

5 A Just that, you know, that's annoying.

6 Q Did you want something done about the note?

7 A No.

8 Q Did you ask Mr. McGrath to do something about the
9 note?

10 A No.

11 Q Did you tell him that Joseph Tranchina passed you
12 the note?

13 A No.

14 Q Did Mr. McGrath expect that he was to do something
15 about the note based on you telling him?

16 MR. ROCHE: Objection.

17 THE COURT: Let me just review that question.
18 Overruled. You may answer. Did you expect. As to the
19 form of it, I'm going to sustain the objection. If you
20 can rephrase that, you can ask it.

21 BY MR. MIRANDA:

22 Q Based on what you had communicated to Mr. McGrath,
23 did you anticipate that he was going to do something
24 about the note?

25 A No.

~~MAYER - CROSS - MIRANDA~~

- 1 Q Do you smoke?
- 2 A I do not.
- 3 Q In January of 2016 did you smoke?
- 4 A I have never smoked.
- 5 Q Were you in a relationship with another individual
- 6 before you were in a relationship with Mr. McGrath?
- 7 A I was.
- 8 Q And when did that relationship end?
- 9 A Roughly in the fall, early winter 2015.
- 10 Q How long had you been in that relationship?
- 11 A We had started dating roughly 2012.
- 12 Q About three years?
- 13 A Yes.
- 14 Q So at the time you met Mr. McGrath, you were just
- 15 coming out of a three-year relationship?
- 16 A I was.
- 17 Q When you met Mr. McGrath in the middle of
- 18 January 2016, were you romantically interested in him?
- 19 A I was interested in him. You know, I like the
- 20 conversation we had and we seemed to get along.
- 21 Q You have two kids now, correct?
- 22 A I do.
- 23 Q So you became -- you -- you have eventually become
- 24 romantically interested in him, correct?
- 25 A I did.

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~~MAYER - CROSS - ABEL~~

1 Q When do you think that took place?

2 A A little while -- I mean, I had just gotten out of
3 a relationship and I wasn't looking for anything
4 serious, and we just were talking. I was taking it how
5 it went, just taking things how it went, the more you
6 talk to somebody and get to know them. You know, you
7 either like them or you don't.

8 MR. MIRANDA: Thank you. No further
9 questions.

10 THE COURT: Any questions on behalf of
11 Defendant Barnaby?

12 MR. ABEL: Very briefly.

13 CROSS EXAMINATION

14 BY MR. ABEL:

15 Q Good afternoon, Miss Mayer.

16 A Hi.

17 Q As of January 28, 2016, did you know Sergeant
18 Barnaby?

19 A I can't say if I knew -- I mean, we worked in the
20 same facility. I don't -- I don't know.

21 Q You said you worked in the F-2 dorm?

22 A Yes.

23 Q Is that in the main part of Bare Hill?

24 A It is.

25 Q So, as far as -- was Sergeant Barnaby your regular

~~MAYER - REDIRECT - ROCHE~~

1 supervisor at that time?

2 A Honestly, I -- at this point, I can't tell you who
3 was normally the supervisor.

4 Q Had you ever been out socially with Sergeant
5 Barnaby outside of work?

6 A No.

7 Q Did you ever see Sergeant Barnaby at a place known
8 as The Pines?

9 A Not that I recall.

10 Q Miss Mayer, you referenced a senior officer that
11 told you to throw the note from Mr. Tranchina away?

12 A I did, yes.

13 Q Do you recall who that senior officer was?

14 A Yes, Officer Jewtraw, J-E-W-T-R-A-W.

15 MR. ABEL: No further questions.

16 THE COURT: Any redirect?

17 MR. ROCHE: Yes, your Honor.

18 REDIRECT EXAMINATION

19 BY MR. ROCHE:

20 Q Miss Mayer, are you aware that Officer Jewtraw
21 was interviewed by OSI in relation to the -- their
22 investigation into the incident involving you and
23 Mr. Tranchina?

24 A I was never told that.

25 Q Okay. You were never told that Officer Jewtraw

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~~MAYER - REDIRECT - ROCHE~~

1 said that he never told you to throw out the --

2 MR. MIRANDA: Objection.

3 THE COURT: Sustained. Hearsay.

4 Q Now, you said that you were angry when this note
5 was passed to you, right?

6 A I did.

7 Q And you told Mr. McGrath that you were angry about
8 it?

9 A I don't think I told him I was angry. It was
10 probably my tone of voice that I was annoyed.

11 Q So you would agree that it was clear from how you
12 told him that you were angry about this note being given
13 to you?

14 A I don't know. I don't know how he took it.

15 Q Okay. But did you express anger as you were
16 telling him about it?

17 A I was probably like, oh, my god, I got a note. You
18 know, this is annoying. I wasn't screaming or --

19 Q And was that in the same conversation that you told
20 him about the cube number, how the inmate had passed you
21 the note?

22 A I had said before, like, I probably said oh, I got
23 a note from bed two or cube five or that's just how
24 people refer to inmates in prison.

25 Q So that's how corrections officers identify inmates

1 in prison? By their cube number?

2 A Usually or -- yes.

3 Q Now, you had been assigned to the F-2 dorm pretty
4 constantly for at least a month prior to being
5 transferred out of Bare Hill, correct?

6 A Yeah, my last month there I was in F-2.

7 Q Okay.

8 MR. ROCHE: Thank you. I have nothing else.

9 THE COURT: Anything else?

10 MR. MIRANDA: No, your Honor.

11 THE COURT: All right. If you would kindly
12 put your mask back on, that concludes your testimony
13 and you are free to leave.

14 THE WITNESS: Thank you.

15 (Witness excused)

16 THE COURT: Plaintiff may call their next
17 witness.

18 MR. ROCHE: Your Honor, may we have a brief
19 sidebar?

20 THE COURT: Do you have any more witnesses?

21 MR. ROCHE: Not at this time but we may have
22 some additional evidence. No witnesses at this point.

23 THE COURT: All right. I'm just going to step
24 out in the hallway for one moment to discuss some legal
25 matters with counsel. I'll have you remain in place so

1 that we can continue. Please feel free to stand up and
2 stretch. No parties in the jury box when I come out in
3 the hallway. Don't talk about the case and continue to
4 follow all of the instructions.

5 (Discussion held out of jury's presence)

6 THE COURT: Okay, go ahead.

7 MR. ROCHE: So, yes, we don't have any
8 additional witnesses. We do have some depositions that
9 we would like to read. Nothing very extensive but there
10 are some portions that we would like to read.

11 THE COURT: Of the parties?

12 MR. ROCHE: No, of some witnesses. So there
13 were some corrections officers that responded to the
14 scene. There's an Officer Hurteau, an Officer Rabideau
15 and Officer Debia (phonetic), that I would like to read
16 just portions of their testimony, mostly about their
17 arrival on the scene and what they observed.

18 THE COURT: Is there any objection to that on
19 the part of Defendant McGrath?

20 MR. MIRANDA: I think Mr. Hurteau is going to
21 be here by 3:00 and he was going to be our first
22 witness. I anticipate it will be very brief. So
23 perhaps that would eliminate that issue. I don't think
24 I have any objection to the other responders. If we
25 would be extended the same so that we can read anything

1 we like.

2 THE COURT: Well, why don't you go ahead and
3 read from -- I mean, they're not parties so --

4 MR. ROCHE: Right.

5 THE COURT: But if there's no objection, you
6 can read from them and hold off on Hurteau because it
7 sounds like you're going to have an opportunity to
8 cross-examine him.

9 MR. REED: I'm confused as to why they weren't
10 called as witnesses if they wanted their testimony in at
11 trial.

12 THE COURT: Well, I mean, I don't want to get
13 into that because that -- you know, I don't know why
14 they weren't called. If you have an objection to it,
15 just let me know.

16 MR. REED: I object, that's evidence.

17 THE COURT: Under what authority do you
18 have -- under what federal rule do you have the right to
19 read from non-party depositions?

20 MR. ROCHE: Well, just, your Honor, I would
21 just argue that just in the interest of expediency, it
22 just makes more sense to. I know Your Honor was anxious
23 to get this trial done as soon as possible. It would be
24 much quicker to just read in the relevant portions that
25 the -- these witnesses previously testified to at

1 deposition rather than taking up the time, the Court's
2 and the jury, for live testimony. So I'm just proposing
3 that as kind of a pragmatic solution.

4 THE COURT: Mark up for me what you want to
5 read, I'll give it consideration.

6 MR. ROCHE: Thank you.

7 THE COURT: But other than that, you're
8 resting?

9 MR. ROCHE: Yes. And just -- if for some
10 reason Officer Hurteau does not testify, we would just
11 ask that we be permitted to submit some portions of his
12 testimony later too.

13 THE COURT: All right. I'm going to have you
14 gentlemen -- I'm going to let you reserve on your
15 motions, I'm going to let you make motions but not right
16 now. I'll let the jurors know that the plaintiff is
17 resting. If I do agree to allow you to read some
18 deposition testimony, I'll say something to the jurors
19 as an into to that so they'll understand. Who is the
20 first defense witness?

21 MR. MIRANDA: That would be Patrick Hurteau,
22 your Honor.

23 THE COURT: Is he here?

24 MR. MIRANDA: He texted at lunch, said he was
25 in Glens Falls and I hope he's here by now.

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1 THE COURT: Do you have anybody else you can
2 put on?

3 MR. MIRANDA: Not if he's not here, no, your
4 Honor.

5 THE COURT: Who do you have after Hurteau?

6 MR. MIRANDA: The only other witness would be
7 the Jeremy Laramay issue, your Honor, and then we would
8 rest, and of course if -- we might want to read some
9 deposition transcripts in of the other first responders
10 if defense counsel do but these first -- like,
11 Mr. Hurteau will be very brief.

12 THE COURT: So just have -- assuming I allow,
13 you want to read from Laramay's transcript and then you
14 have Mr. Hurteau. Would you have your colleague give
15 him a call and see where he is and get him here like
16 right now.

17 MR. MIRANDA: Yes. Absolutely.

18 THE COURT: Okay. Can you do that now? I
19 don't want -- I really don't want to wait until 3:00.
20 It's only 10 of 2.

21 MR. ROCHE: Your Honor, may I be heard briefly
22 about the Laramay portion?

23 THE COURT: Yes.

24 MR. ROCHE: So, counsel marked for us the --
25 there's one particular passage or one minor, little

1 passage just identifying that this witness Laramay was
2 the -- what was his -- the watch commander on the date
3 of the incident, and then there was another portion that
4 they asked us to consider but all of the second portion
5 did was talk about the prevalence of weapons in
6 facilities and inmates making weapons out of Plexiglas,
7 which I would submit is -- it's cumulative to begin with
8 but it's also wholly irrelevant.

9 It doesn't shed any light on the issue of
10 whether or not Mr. Tranchina possessed a weapon or not
11 and it's -- it's prejudicial and because it's kind of --
12 it's basically suggesting that inmates do this -- kind
13 of lumps them all in together, and it doesn't shed light
14 on any of the issues that have to be decide by the jury
15 in this particular case. So, based on that, I would
16 object to the testimony. I believe it's wholly
17 irrelevant.

18 THE COURT: Go ahead.

19 MR. MIRANDA: Thank you. We were trying to
20 narrow the issues and I think what was submitted to the
21 Court there was a bit more that we were seeking. Before
22 the break, we went to counsel and as Mr. Roche
23 indicated, we identified two portions of the transcript,
24 one just to lay some foundation so the jury understands
25 for Mr. Laramay.

1 And I don't have the testimony in front of me
2 but what we would like to extract from that specific
3 deposition transcript is that Mr. Laramay was aware of a
4 missing Plexiglas investigation, which is different than
5 what anyone else has testified into this incident.
6 There has been testimony about weapons and contraband
7 but he specifically as watch commander can speak to
8 missing Plexiglas investigation which we believe
9 directly bears on Mr. Tranchina potentially having
10 access to the weapon.

11 THE COURT: Well, here's the thing. There's
12 been plenty of testimony about the fact that weapons are
13 made out of Plexiglas. There's been plenty of testimony
14 that inmates can be dangerous, there's been plenty of
15 testimony about Plexiglas being available in all areas
16 of the prison.

17 I carefully reviewed the testimony that you
18 wanted to read. I certainly don't find it prejudicial
19 but on the other hand, I do find it totally cumulative
20 and we're not trying a criminal case here as to try to
21 prove that Mr. Tranchina is the one who was stealing
22 Plexiglas and making shanks.

23 The only question for the jury is whether or
24 not that was his shank or whether it was a plant, and
25 for that reason, not because of prejudice but because I

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1 find it cumulative, I'm not going to allow the reading
2 of the Laramay deposition as you requested. I see
3 absolutely no prejudice to Defendant McGrath because
4 that is all in the record.

5 When can that witness be here?

6 MR. BLENK: He said he's five minutes out.

7 THE COURT: Good. What I'm going to do, then,
8 is I'm going to give the jury a break. You need to
9 immediately show me what you want to read. My chance of
10 allowing you to do that is slim to none but I will look
11 at it because it's really not an appropriate use of a
12 deposition and -- but I will take a look at it.

13 In the meantime, I will hear arguments on
14 motions that anybody wants to make. Okay? So either
15 you or Mr. Weiss get to me what it is you want read to
16 the jury and I will make a decision. I can multiple
17 task.

18 (Return to the courtroom)

19 THE COURT: Ladies and gentlemen, trials are
20 pretty dynamic. It's like live T.V.

21 There are a couple of things that I want to
22 say. In just a moment, from talking to the attorneys,
23 the plaintiff is going to rest his case, and if there
24 are going to be other witnesses, they are about ten
25 minutes out. So that's a good thing, and I want to talk

1 to you about timing because I told you on Tuesday that
2 we hope that we could finish this case in four days.

3 I'm very hopeful that we will have this case
4 to you for your consideration tomorrow, which is four
5 days. So I know that as jurors, you wonder about, you
6 know, the personal responsibilities and where you have
7 to be. With the way we are moving, I am fairly
8 confident that we will be able to get this case to you
9 for your deliberations tomorrow.

10 So just so you know that but because it's
11 going to take about ten minutes to get another witness
12 here, should another witness be called, I'm going to
13 have you retire to the jury deliberation room so that
14 you don't have to sit here staring at all of us, and as
15 soon as that witness gets here, I'll have Britney bring
16 you in.

17 Don't discuss the case amongst yourselves or
18 with anyone else and continue to remember all of the
19 instructions I have given you. Thank you.

20 (Jurors excused)

21 THE COURT: Be seated. Does the Defendant
22 McGrath have any motions?

23 MR. MIRANDA: If we could have -- the Attorney
24 General wants to make a motion first.

25 THE COURT: Is Mr. Abel going to make a motion

1 for both? Mr. Reed, you want to make a motion for both
2 defendants?

3 MR. REED: Just for Defendant Barnaby, your
4 Honor.

5 THE COURT: Okay. Go ahead.

6 MR. REED: I can go first. Pursuant to
7 Federal Rule of Civil Procedure 50, Defendant Barnaby
8 moves for a judgment as a matter of law based on the
9 lack of proof that's been offered indicating Sergeant
10 Barnaby's involvement in this incident, coupled with the
11 evidence of the injuries attributed to Sergeant Barnaby,
12 are not consistent with the alleged actions taken by
13 him.

14 THE COURT: All right. Thank you. Does the
15 Defendant McGrath want to make a motion at this time?

16 MR. BLENK: Your Honor, the Defendant McGrath
17 would like to make the same motion for a directed
18 verdict.

19 THE COURT: All right. I'll render a decision
20 in about five minutes. Thank you.

21 MR. MIRANDA: Thank you, your Honor.

22 MR. REED: Thank you, your Honor.

23 THE COURT: We will stand in recess. Well,
24 what I will do is I will ask you, Mr. Miranda, to get
25 ahold of Britney as soon as your witness gets here.

1 Thank you.

2 (Following recess)

3 THE COURT: On the motions, is it all right if
4 I proceed rendering a decision on the motions without
5 Mr. Weiss here?

6 MR. ROCHE: Yes, your Honor.

7 THE COURT: Okay, thank you. Federal Rule of
8 Civil Procedure 58 provides that if a party has been
9 fully heard on an issue during a jury trial and the
10 Court finds that a reasonable jury would not have a
11 legally sufficient evidentiary basis to find for the
12 party on that issue, the Court may grant a motion for
13 judgment as a matter of law on that issue. That is
14 Federal Rule of Civil Procedure 50(a)(1).

15 That motion may be made at any time before the
16 case is submitted to the jury and it must specify the
17 judgment sought and the law and facts that entitle to
18 move on to the judgment. That is Federal Rule of Civil
19 Procedure 50(a)(2).

20 The Court may grant a Rule 50 motion only when
21 considering the evidence in the light most favorable to
22 the non-moving party and drawing all reasonable
23 evidentiary inferences in that party's favor there was
24 no legally evidentiary basis for a reasonable jury to
25 find in favor of a non-moving party; *Nimely versus City*

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1 *of New York*, 414 F.3d 381, 390, Second Circuit 2005.

2 In the present matter, there is a sharp
3 contrast to the facts which must be resolved by the
4 jury. Plaintiff has testified that while he was lying
5 on the ground, Defendant Barnaby kicked plaintiff in the
6 face upon arriving in the annex school on January 28,
7 2016. Contrastingly, Defendant Barnaby has testified
8 that by the time he arrived in the annex school,
9 plaintiff was already handcuffed and standing by another
10 corrections officer.

11 Similarly, plaintiff and Defendant McGrath
12 have testified to drastically different accounts of the
13 events on January 28, 2016. The Court finds that these
14 questions of fact most definitely preclude the Court
15 from granting defendants' motions. Construing the
16 evidence in the light most favorable to the plaintiff as
17 I must, the Court finds that a reasonable jury could
18 find in favor of plaintiff on this claim against the
19 defendants; therefore, the defendants' motions -- both
20 motions are denied.

21 Now, Mr. Weiss, I'm going to give you an
22 opportunity to rest in front of the jury. Obviously I
23 have not had a chance to review those transcripts that
24 you want me to see yet. I will do that and get back to
25 you on that.

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~~HURTEAU - DIRECT - BLENK~~

1 Let's get the jury, please.

2 (Jurors enter courtroom, 2:15 P.M.)

3 THE COURT: Mr. Weiss, does the plaintiff have
4 any other witnesses?

5 MR. ROCHE: Your Honor, plaintiff does not
6 have any other witnesses. Plaintiff rests at this time.

7 THE COURT: Does the plaintiff rest?

8 MR. ROCHE: Yes.

9 THE COURT: All right. Members of the jury,
10 the plaintiff has now rested his case and the defendants
11 may, if they wish, call witnesses.

12 Does the Defendant McGrath have any witnesses?

13 MR. BLENK: Defendant McGrath calls Patrick
14 Hurteau.

15 COURT CLERK: Would you please raise your
16 right hand and state your full name for the record.

17 THE WITNESS: Patrick John Hurteau, correction
18 officer.

19 P A T R I C K H U R T E A U , having been duly sworn,
20 was examined and testified as follows:

21 THE COURT: Officer Hurteau, I've left it up
22 to each witness as to whether they would like to testify
23 with their mask on or off. So that's something that you
24 can decide. Either way, please speak right into the
25 microphone and speak as clearly as you can.

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~~HURTEAU - DIRECT - BLENK~~

1 DIRECT EXAMINATION

2 BY MR. BLENK:

3 Q Good afternoon, Mr. Hurteau. My name is James
4 Blenk and I represent the Defendant McGrath, along with
5 my colleague, Mr. Miranda.

6 Just some background. Are you here pursuant to a
7 subpoena that my office served upon you?

8 A Yes, I am.

9 Q Thank you. And are you still employed by DOCCS?

10 A Yes, I am.

11 Q When did you start working for DOCCS?

12 A January 9, 1989.

13 Q And have you been a correction officer that entire
14 time?

15 A Yes, I have.

16 Q You were employed by DOCCS on January 28th, '16,
17 when the incident at issue in this case happened?

18 A Yes, I was.

19 Q Okay. Were you working at Bare Hill Correctional
20 Facility?

21 A Yes.

22 Q Do you recall what your job duty was that day?

23 A I was a roundsman number two on dayshift.

24 Q Is that a bid job that you do regularly?

25 A At that time, yes, it was my bid.

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~~HURTEAU - DIRECT - BLENK~~

1 Q And now you're a different bid?

2 A Yes.

3 Q Okay. When did you first learn of the incident
4 occurring on January 28th, 2016?

5 A I was in the van with my partner, rounds number
6 one. We were monitoring the program in the main
7 compound and --

8 Q Let me stop you there. I'm sorry. So are you in a
9 van throughout the course of your duties?

10 A No. Just at that moment I was in, watching the
11 program run.

12 Q And when you say "program run," do you mean inmates
13 going from what would be their breakfast, to or from
14 their dorms to programming?

15 A Yes. From the dorms to programs.

16 Q And when that's occurring, describe to us what
17 you're doing on a normal day.

18 A At that time for the program run?

19 Q That's correct.

20 A They have certain points throughout the compound
21 where the officers have to watch the walkways because
22 the inmates are walking freely to their programs, and we
23 monitor that, make sure there's no fights on the walkway
24 or they're going where they are supposed to.

25 Q And who are you with at the time?

HURTEAU - DIRECT - BLENK

1 A I was with Officer Rabideau, he was rounds number
2 one.

3 Q Can you tell us how you heard about the incident.

4 A We have a -- a system where if there's a problem,
5 it comes over our two-way radios. We hear, like, a
6 chime that let us know that something's come in and
7 then the arsenal will let us know that there was a red
8 dot in the annex school.

9 Q What do you mean by "red dot?"

10 A That means there's a problem we have to -- there's
11 certain people that are assigned to respond. We had to
12 respond to it.

13 Q Was Officer Rabideau also on the red dot team?

14 A Yes, he was.

15 Q And was there anybody else on the red dot team as
16 you recall as you sit here today?

17 A As I sit here today?

18 Q As you here today?

19 A Oh. Yeah, there's other people.

20 Q On the red dot response team?

21 A Yes.

22 Q Okay. Do you know who else was on the red dot
23 response team?

24 A I remember that Barry Debia -- they have different
25 levels. He had a rounds number three in the annex

~~HURTEAU - DIRECT - BLENK~~

1 compound. See, it's broke down because there's some
2 that respond just to the main, some that respond just to
3 the annex. So it's --

4 Q And on that day, would you have responded to either
5 the annex on the main or would you have only responded
6 to --

7 A Because we're mobile with a van, we respond to
8 both. Yes.

9 Q Understood. So how long did it take for you to get
10 to the school annex?

11 A Approximately a minute.

12 Q Did you go straight to the annex or were you doing
13 something else that you had to get to the van or --

14 A No, we were in the van already but we have to --
15 it's not a straight shot. We have to go around
16 different ways, and then there's inmates walking on the
17 roadway on the side, so we -- you have to watch out for
18 that too.

19 Q Okay. Did you see -- did you see Defendant Justin
20 McGrath when you arrived at the school annex?

21 A When we got there, I got out of the van and when I
22 entered the foyer area, yes, he was in the foyer.

23 Q Okay. And was Plaintiff Tranchina there as well?

24 A Yes, he was.

25 Q And was Plaintiff Tranchina standing up or on the

~~HURTEAU - DIRECT - BLENK~~

1 ground?

2 A He was standing up in the corner, he had already
3 had mechanical restraints, handcuffs. His hands were
4 behind his back, he was already handcuffed, and he was
5 facing the corner.

6 Q When you got there, was Defendant McGrath touching
7 Plaintiff Tranchina?

8 A No.

9 Q Were they right next to each other?

10 A He was standing behind him.

11 Q Okay. Could you see Mr. Tranchina's face?

12 A No, because he was facing the corner.

13 Q Okay. Did you see Defendant McGrath kick or punch
14 Mr. Tranchina?

15 A No.

16 Q Did you see anybody kick or punch Mr. Tranchina?

17 A No.

18 Q Did you know Mr. McGrath before arriving at the --
19 at the school annex in January 28th, 2016?

20 A I knew his face and his name but we have had so
21 many -- so much turnover for officers, that I didn't
22 know him personally.

23 Q Did you ever socialize with him outside of work?

24 A No.

25 Q Did you see Mr. Tranchina -- or Mr. McGrath leave

~~HURTEAU - DIRECT - BLENK~~

1 the vestibule in front of the school annex?

2 A No.

3 Q Did you go back to your van after this interaction?

4 A No. I -- I stayed in the -- in the foyer area with
5 McGrath and the inmate, and at some point, Sergeant
6 Barnaby came out to us. Officer Rabideau was behind me
7 at that point and we were both there. And when Sergeant
8 Barnaby came out, he give Officer Rabideau and I an
9 order that we were going to be taking the inmate to SHU,
10 special housing unit.

11 Q Okay. How many officers were in the room when
12 Sergeant Barnaby got there?

13 A Just Officer McGrath and myself and Officer
14 Rabideau were standing in the doorway in the foyer.

15 Q So did you assist in bringing Mr. Tranchina to the
16 van?

17 A Yes.

18 Q Did he walk on his own accord?

19 A Yes, he did.

20 Q Did he complain of any injuries?

21 A No, he did not.

22 Q Did he tell you what had happened?

23 A He didn't talk to me at all.

24 Q Did Mr. McGrath tell you what had happened?

25 A No.

HURTEAU - CROSS - REED

1 Q Mr. Hurteau, were you aware of any issues with
2 Plexiglas at the Bare Hill facility around the time of
3 January 2016?

4 A As far as the time limit, I'm not sure. I know
5 that we did have some Plexiglas come up missing in the
6 work control area at one point and the inmates were
7 making weapons out of them. They are undetectable in
8 the metal detectors.

9 Q So you're saying compared to other materials, the
10 Plexiglas weapons have an advantage because they're not
11 caught?

12 MR. ROCHE: Objection, your Honor. This is
13 totally cumulative.

14 THE COURT: Lisa, can you read back that
15 question.

16 (Question read by court reporter)

17 THE COURT: Sustained.

18 MR. BLENK: I don't have any further
19 questions.

20 THE COURT: Any questions on behalf of
21 Defendant Barnaby?

22 MR. REED: Yes, your Honor.

23 CROSS EXAMINATION

24 BY MR. REED:

25 Q So when you arrived at the school annex foyer that

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~~HURTEAU - CROSS - REED~~

1 day, the inmate was already on his feet?

2 A Yes, he was.

3 Q And it's unclear. Did you arrive with Sergeant
4 Barnaby?

5 A No.

6 Q He was not yet in the foyer yet though when you got
7 there?

8 A All I remember is he was -- at some point he came
9 out of the foyer, I believe he might have already been
10 inside the annex school talking to the lieutenant on the
11 phone about what was going on of the incident.

12 Q Okay. So this is four years ago. You're not
13 really sure what time he arrived?

14 MR. ROCHE: Objection.

15 A No.

16 THE COURT: I'm sorry. I'm often looking at
17 my screen so -- you made an objection?

18 MR. ROCHE: Your Honor, I will withdraw the
19 objection.

20 THE COURT: Thank you.

21 BY MR. REED:

22 Q Mr. Tranchina was on his feet when you arrived?

23 A Yes.

24 Q In handcuffs?

25 A Yes.

~~HURTEAU - CROSS - ROCHE~~

1 Q Facing away from the outer door to that foyer.

2 Correct?

3 A Yes. When I walked in, he was facing the corner,
4 the left corner of the foyer.

5 Q You didn't see Sergeant Barnaby kick the plaintiff,
6 did you?

7 A No.

8 Q You didn't see him punch the plaintiff, did you?

9 A No.

10 Q Did you see him make any physical contact with the
11 plaintiff at all on January 28, 2016?

12 A No. No.

13 MR. REED: Nothing further, your Honor.

14 THE COURT: Any cross?

15 MR. ROCHE: Very briefly, your Honor.

16 CROSS EXAMINATION

17 BY MR. ROCHE:

18 Q Good afternoon, Officer Hurteau. So, I believe
19 you testified -- I just want to clarify that you believe
20 that Sergeant Barnaby was already at the incident
21 location before you arrived. Correct?

22 A I would be speculating. All I remember is he came
23 out to the foyer at one point. I mean, there's
24 different entryways to this building. He could have
25 came in the other side. I -- I do remember him coming

~~HURTEAU - CROSS - ROCHE~~

1 out and he gave us an order to put the inmate in the
2 van, we were going to take him to special housing unit.

3 Q Okay. So when you first saw him at the location,
4 he came into the foyer area from the school, is that
5 fair to say?

6 A From the other side, yes.

7 Q So he didn't come in from the exterior of the
8 building. He came from the interior?

9 A Yes.

10 Q Okay. And I believe you -- you testified that it
11 was your belief that he was communicating with
12 Lieutenant Laramay at -- prior to you seeing him walk
13 into the foyer?

14 MR. BLENK: Objection. Mischaracterizes the
15 testimony.

16 THE COURT: Overruled. You can answer. Do
17 you need it read back?

18 THE WITNESS: Yes, please.

19 THE COURT: Lisa, would you read it back.

20 (Question read by court reporter)

21 A Yes, because the lieutenant would have to authorize
22 what happens. When he came out, he ordered us that we
23 were taking him to SHU so that he would have had to talk
24 to the lieutenant.

25 Q So he would have had to talk to the lieutenant

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UNITED STATES DISTRICT COURT - NDNY

~~HURTEAU - CROSS - ROCHE~~

1 before giving you that order --

2 A Yes.

3 Q -- to go to SHU? Okay. Fair to say that when you
4 arrived at the foyer area, there were no other officers
5 in the area other than Officer McGrath?

6 A No.

7 Q Is that -- is that -- sorry. Are you saying no,
8 there were no other officers or no, what I just the said
9 is not accurate?

10 A No, there was no other officers at that point when
11 I got there.

12 Q Okay. So all you saw in the foyer when you got
13 there was Mr. Tranchina facing the corner and
14 Officer McGrath standing behind him?

15 A Yes.

16 Q Okay.

17 MR. ROCHE: Thank you.

18 THE COURT: Anything else on behalf of
19 Defendant McGrath?

20 MR. BLENK: No, your Honor.

21 THE COURT: Anything else on behalf of
22 Defendant Barnaby?

23 MR. REED: No, your Honor.

24 THE COURT: All right, sir, if you would
25 reapply your mask, that concludes your testimony and you

1 are free to leave. Thank you.

2 (Witness excused)

3 THE COURT: While we're waiting for the
4 witness box to be sanitized, does Defendant McGrath have
5 further witnesses?

6 MR. BLENK: We would just reserve the right to
7 call Rabideau and Officer Debia in rebuttal if
8 necessary.

9 THE COURT: Other than talking about rebuttal,
10 are you resting?

11 MR. BLENK: Yes.

12 THE COURT: All right. So the Defendant
13 McGrath, members of the jury, has rested his case.

14 Does the Defendant Barnaby have any witnesses?

15 MR. REED: He does not, your Honor.

16 THE COURT: All right. Is there
17 any additional rebuttal on behalf of plaintiff at this
18 time?

19 MR. ROCHE: No rebuttal, your Honor. Just a
20 matter we previously discussed.

21 THE COURT: Yes. Members of the jury, would
22 you please return to the jury room as I discuss a few
23 matters of law. Don't discuss this case amongst
24 yourselves and don't discuss it with anyone else, don't
25 come to any conclusions because this case is not over at

1 this time.

2 (Jurors excused)

3 THE COURT: Everyone may be seated. The
4 record should reflect that we're in open court, outside
5 the presence of the jury.

6 With respect to the plaintiff's request to
7 read portions of the testimony of witness Hurteau, that
8 request is denied. Officer Hurteau just testified and
9 could be asked any questions that plaintiff thought were
10 pertinent during cross-examination.

11 With respect to the plaintiff's request to
12 read portions of the testimony of Barry Debia, on page 7
13 was requested to read the following: Page 7, line 13.

14 "QUESTION: Okay. Under the column
15 January 28, 2016, your name is listed below next to
16 roundsman number three annex. Is that -- was that your
17 job on January 28th, 2016?

18 "ANSWER: Yes, it was."

19 I'm denying that request.

20 On the same page, line 21. Okay. Was there a
21 time where you received your radio call to respond as a
22 red dot response?" The answer is yes. I'm denying that
23 request.

24 On page 8, beginning on line 17, it was
25 requested that lines 17 through 24 be read.

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1 "QUESTION: Annex school and were you with
2 the -- and were you with anybody when you went to the
3 school annex?

4 "ANSWER: No.

5 "QUESTION: What did you see when you arrived
6 at the school annex?

7 "ANSWER: I saw Officer Rabideau escorting an
8 inmate to the -- in handcuffs and putting him in the van
9 with sergeant supervising." I'm denying that request.
10 I believe that there's already ample testimony about
11 what people saw when they arrived and actually all of
12 the officers that I heard said the same thing, that the
13 inmate was in handcuffs standing up.

14 MR. ROCHE: Your Honor, I'm sorry to interrupt
15 you but I just -- upon review it, I actually agree with
16 Your Honor. At this point we would withdraw our request
17 to read these portions for both Officer Debia and
18 Officer Rabideau. I believe we got --

19 THE COURT: Okay.

20 MR. ROCHE: -- testimony we needed from
21 Officer Hurteau.

22 THE COURT: Thank you. So there will not be
23 any reading from the testimony of Mr. Debia or
24 Mr. Hurteau. I take it that both defendants renew their
25 motions for a directed verdict?

1 MR. BLENK: That's correct, your Honor.

2 MR. MIRANDA: Yes, your Honor.

3 THE COURT: For the reasons I previously set
4 forth, those motions are denied.

5 Here's what we are going to do. In just a few
6 minutes my law clerk is going to hand out the proposed
7 charge to you. As I said from day one, this is a pretty
8 basic charge in which I will be charging the jury on the
9 count on the claim of excessive force and failure to
10 intervene.

11 I would ask counsel to review the charge and
12 the proposed jury verdict sheet, and as soon as you have
13 a chance to do that, please let my courtroom deputy,
14 Britney, know. I'll hear any exceptions or requests
15 that you have. It is my plan to move right into
16 summations. It's only 2:36, the day is young.

17 MR. ROCHE: Your Honor, I would request -- I
18 would request that we be allowed to testify -- or
19 allowed to sum up first thing in the morning.

20 THE COURT: No. I'm not -- you know, I am
21 very, very thoughtful of jurors' time. There isn't a
22 reason in the world that we can't start with summations.
23 I believe that we can finish both summations today. I
24 don't keep jurors who are traveling a distance any
25 longer than I have to keep them. As I say, I don't

1 think the charge is difficult. All attorneys have -- I
2 think all attorneys know what the issues are.

3 So, as soon as my law clerk brings the
4 proposed charge in, please take a look at it and I will
5 then hold a charge conference in the courtroom and we
6 will move into summations. Thank you.

7 (Following recess)

8 THE COURT: Let the record reflect that we're
9 in open court, outside the presence of the jury, and
10 that I've given to both counsel a copy of the proposed
11 charge and proposed jury verdict form.

12 Has the plaintiff reviewed the proposed jury
13 instructions?

14 MR. WEISS: Yes, your Honor.

15 THE COURT: Do you have any exceptions on
16 behalf of the plaintiff to the instructions?

17 MR. WEISS: No, your Honor.

18 THE COURT: All right. Thank you. Has
19 defendant for Officer McGrath had an opportunity to
20 review the proposed jury instructions?

21 MR. BLENK: Yes, your Honor.

22 THE COURT: Are there any objections or
23 requests?

24 MR. BLENK: On page 14 I would ask for the
25 last sentence in the first paragraph, the paragraph that

1 continued from 13, an excessive force claim, the element
2 have you established the victim does not suffer serious
3 or significant injury, so long as the -- as he has
4 suffered some injury.

5 I think that's redundant of the prior sentence
6 and encourages the -- is -- is akin to influence the
7 jury to look for a lower quantum of injury than just if
8 they had just read the word injury as it appears in the
9 prior sentence. It might be an appropriate matter for
10 clarification that the jury has questions but I would
11 ask that that sentence to be removed.

12 THE COURT: Did you say that was page 14?

13 MR. MIRANDA: That's correct.

14 THE COURT: Tell me where on that page again.
15 I'm just not finding it.

16 MR. BLENK: The first full sentence on that
17 page. In an excessive force claim.

18 THE COURT: Okay. In an excessive force
19 claim, this element may be established even if the
20 victim has not suffered serious or significant injury so
21 long as he's suffered some injury. Is that the
22 sentence?

23 MR. BLENK: Correct.

24 THE COURT: And tell me again what your issue
25 is.

1 MR. BLENK: I think that's implied by the --
2 prior sentence it says an injury, and it already
3 instructs an injury is required. There's no suggestion
4 that a serious or significant injury would be necessary,
5 so I don't think that there's any reason to address
6 that.

7 THE COURT: Okay. I mean, that's pretty
8 standard language and I don't find it prejudicial. So
9 that request is denied. Anything else?

10 MR. BLENK: No, your Honor.

11 THE COURT: Does Defendant Barnaby have any
12 objection or requests?

13 MR. REED: No, your Honor.

14 THE COURT: All right. Have you had an
15 opportunity to take a look at the verdict sheet? The
16 jury verdict form?

17 MR. WEISS: Yes, your Honor.

18 THE COURT: Does the plaintiff have any
19 objections for the jury verdict form?

20 MR. WEISS: No, your Honor.

21 THE COURT: Does the Defendant McGrath have
22 any objections to the jury verdict form?

23 MR. BLENK: No, your Honor.

24 THE COURT: Does the Defendant Barnaby have
25 any objections to the jury verdict format?

1 MR. REED: No, your Honor.

2 THE COURT: When it originally was printed
3 out, it printed double side but it is not going to go in
4 double sided to the jury. We are going to make that
5 single page.

6 So just so you know, I send in one copy of the
7 jury instructions to the jury while they're
8 deliberating. I do give every juror a copy of the jury
9 verdict form. After I recite the charge, I will give
10 all sides an opportunity to point out if I made an
11 error, which can happen, and I take no umbrage if I
12 misstated something and you want to fix it, so you will
13 have that opportunity as well.

14 We will be starting summations with Defendant
15 Barnaby, we will be going in reverse order. About how
16 long do you think the Defendant Barnaby's summation will
17 take?

18 MR. ABEL: 10, 15 minutes.

19 THE COURT: Okay. Believe me, I'm not going
20 to hook you off, you know, if you get to 15 minutes.
21 I'm just trying to gauge it. How about Defendant
22 McGrath?

23 MR. MIRANDA: Probably the same, your Honor.

24 THE COURT: Okay. And plaintiff?

25 MR. ROCHE: Your Honor, I would say 20 minutes

1 to half an hour.

2 THE COURT: All right. Let's get the jury,
3 please.

4 One of my law clerks just said maybe I should
5 send in eight copies of the charge so they're not all
6 touching, and I will do that in this case. They will
7 have eight forms but we'll send in eight instructions as
8 well.

9 MR. MIRANDA: Your Honor, Ms. Norton indicated
10 that I could you use the wireless microphone. Is that
11 okay?

12 THE COURT: That's fine.

13 MR. MIRANDA: I will stand -- I'll stay
14 stationed.

15 THE COURT: Yes.

16 MR. ROCHE: And, your Honor, just -- I'm
17 just -- ask for some guidance regarding summing up on
18 punitive damages. I can be prepared to sum up.

19 THE COURT: You can ask for them because that
20 will be on the verdict sheet as to whether they want to
21 award them. Stay away from the amount because they will
22 have a separate hearing if they get to that point.

23 MR. ROCHE: Okay.

24 (Jurors enter courtroom)

25 THE COURT: Members of the jury, thank you for

1 your patience as I was going over a multitude of legal
2 issues with the defense attorneys -- with all of the
3 attorneys, not just the defense attorneys, but plaintiff
4 and defense attorneys so that we can get this case ready
5 for summations.

6 We have now reached that point where the
7 attorneys are going to sum up. Summations are not
8 evidence; however, to the extent that you find them
9 helpful, please consider them but remember the testimony
10 that you heard from the witness stand and the documents
11 that will be received by the Court, that is the
12 evidence, and the way we do summation is that we go in a
13 reverse order of the trial.

14 When we began the trial, the plaintiff went
15 first and the defendants went second and third but now
16 we reverse that. So we're going to hear from the
17 attorney for Defendant Barnaby first.

18 MR. ABEL: Good afternoon, ladies and
19 gentlemen. First of all, I'd like to thank you all for
20 your time, your patience this week, especially under
21 these conditions. I know this has been a long week and
22 we are almost at the point where you can begin
23 deliberating. Before we do that, I would like to offer
24 my thanks on behalf of myself, my colleague, Matt Reed,
25 and most of all Officer Barnaby; he also thanks you for

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1 your time this week and for your careful consideration
2 of the evidence.

3 And I'd like to keep in mind what the judge
4 told you a while ago about the burden of proof here. I
5 think for comparison and use of the scale is apt here.
6 It's the plaintiff's burden here to prove more likely
7 than not that Sergeant Barnaby used excessive force on
8 the plaintiff and that he failed to intervene to prevent
9 the use of that force by others, and we respectfully
10 submit that the plaintiffs have not met the burden.

11 You heard a lot of testimony this week and you
12 have seen a lot of the evidence but I'd like to take you
13 back real quick to the very beginning of this trial and
14 I bring plaintiff's opening and maybe some -- they made
15 certain promises to you about what you will see and hear
16 during the trial this week and they simply failed to
17 deliver on those promises.

18 They told you that you would see and hear
19 evidence of a conspiracy between Sergeant Barnaby and
20 Mr. McGrath arising out of this page, report, for
21 example. That there's a conspiracy about getting the
22 plaintiff transferred to Attica. What -- what have you
23 seen to support that? Nothing.

24 They told you that -- that they conspired the
25 misbehavior report but what you have seen? The fact

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1 that Sergeant Barnaby didn't sign it, he had nothing to
2 do with this, so they comport with nothing to
3 demonstrate any sort to get Mr. Tranchina to Attica.
4 That's a promise not kept.

5 They also told you that you would hear
6 evidence of a illegal escort by Sergeant Barnaby but,
7 once more, they show you no proof of illegal escort.
8 Plaintiff himself could not even tell you that he saw
9 Sergeant Barnaby for the rest of after the use of force
10 in the foyer. So, once again, that's another promise
11 that they did not deliver on to you.

12 Now, remember the contradictions in the
13 plaintiff's testimony that you heard during his --
14 during his testimony. He testified that he had no idea
15 of an allegation that he had a weapon on him in the
16 foyer but in a statement he wrote that very night, he
17 expressly referenced a weapon allegation.

18 Plaintiff also testified that there were no
19 witnesses to his relationship with Miss Mayer but,
20 again, the documentary evidence before you demonstrates
21 otherwise. So keep in mind that you have to judge the
22 proof based on the credibility of the witnesses.

23 Sergeant Barnaby has consistently stated his
24 account of the event that morning of January 28th, 2016.
25 He's told you the truth. He's been forthright with you.

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1 Keep in mind it's the plaintiff who has been
2 contradictory here.

3 Now, remember what you heard about this
4 incident. Sergeant Barnaby was doing his rounds that
5 morning. He's covering a shift for another officer. He
6 gets called over a two-way radio to respond to the
7 annex. He doesn't know what the incident is about. He
8 doesn't know that it involves Officer McGrath. He
9 doesn't know that it involves the plaintiff. All he
10 knows is he has to go to respond. 40 seconds later,
11 he's in the annex school building, he sees the plaintiff
12 standing up, facing the corner of the room with
13 Officer McGrath and several other officers there.
14 That's it.

15 He's escorted to the van to the SHU with
16 Officer Rabideau. He's taken to SHU, he's given a
17 medical exam and really that's it. That's the extent of
18 Sergeant Barnaby's involvement here.

19 He didn't kick the plaintiff, he didn't see
20 any use of force being used upon the plaintiff. There's
21 been no evidence to the contrary.

22 So the plaintiff also promised you that you
23 would hear corroboration of his claim but there's no
24 testimony from Officer Rabideau about any illegal
25 escort. There's no testimony from Inmate Cordero about

1 the conditions of his frisk in the school foyer of
2 the -- of the annex school building.

3 There's been no other evidence or testimony
4 from any other -- of the other responding officers who
5 could corroborate his claim that Sergeant Barnaby struck
6 him or that Sergeant Barnaby stood by while others
7 struck him. There's just -- there's no testimony from
8 any other person that corroborates his claim.

9 You heard Officer Hurteau testify that he did
10 not see Sergeant Barnaby strike the plaintiff or that
11 any other strike the plaintiff. You also heard Officer
12 McGrath corroborate the story. So, we respectfully
13 submit the plaintiff has failed to meet their burden of
14 proof on this issue and they have told you that they
15 did -- you would hear things you have not heard them.

16 Now, I'd like you to consider Sergeant Barnaby
17 here just for a second. He's been an officer for ten
18 years. He had just gotten a promotion he worked years
19 to achieve, something that would allow him to work his
20 way up the ladder in his chosen profession. He took a
21 test, he passed, and he had finally got a transfer to
22 the area of the state that is closer to his home but he
23 wasn't done yet. He -- he wasn't done. In fact,
24 Clinton is where he wanted to be.

25 He worked at Bare Hill, and he had to keep his

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1 record clean to complete that, to a complete that trip.
2 He wanted to get back to -- he lived across the street;
3 at that point he was still working in the facility
4 40 miles away. He was close but he wasn't there.

5 If he was found to have used excessive force
6 on an inmate, he would lose that promotion. Why would
7 he get to call, walk 40 seconds, open the door, and kick
8 a man he had never had any contact with? And that's --
9 the plaintiff had no contact with. To assist an officer
10 that he had passing knowledge of? You have to use your
11 common sense, ladies and gentlemen. It just doesn't add
12 up.

13 Why would a sergeant lose his stripes, as they
14 say in the profession, for a gratuitous, momentary act
15 of violence that served no purpose to him? That makes
16 no sense. I think, ladies and gentlemen, you will find
17 that Sergeant Barnaby did not do the acts plaintiff is
18 claiming he performed.

19 And if I could have the picture up.

20 Let's consider the plaintiff's injury just for
21 one moment. The plaintiff is claiming Sergeant Barnaby
22 walked straight through a door, kicked him square in the
23 face two seconds after walking into that room with a
24 black leather boot on.

25 Now this picture was taken a day after this

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1 incident. He has scratches on his face but you see no
2 black and blue marks, you see no swelling, you see
3 nothing that would -- that would support injuries from a
4 swift kick from Sergeant Barnaby that the plaintiff is
5 claiming here.

6 Now, we have all been injured. We all know
7 that injuries look a lot worse the day after. You feel
8 sore, you're bruised, you're swollen. This is not --
9 this is not evidence of a swift kick to the face by a
10 man who's five-eight and approximately 215 pounds.

11 So, ladies and gentlemen, you now get to
12 assess the credibility of the evidence that's been
13 presented to you. You listened to the testimony, you
14 heard the proof. You now have to find that Sergeant
15 Barnaby did not use excessive force. We respectfully
16 suggest the proof does not support such a claim and,
17 furthermore, any use of force by anyone upon plaintiff
18 at any point before Sergeant Barnaby arrived, he simply
19 was not a witness in the use of force at any time on
20 January 20th, 2016. Thank you.

21 THE COURT: Thank you, Mr. Abel. Now
22 recognize counsel for Officer McGrath.

23 MR. MIRANDA: So as our co-counsel indicated,
24 we really do appreciate your being here. We understand
25 the sacrifice and this country really can't function

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1 once again without juries of our peers deciding cases.
2 It's been a long few days. Thank you and thank you very
3 much.

4 So you have been presented with two entirely
5 different versions of what has happened on January 28th,
6 2016.

7 As you'll hear from the judge, you have to
8 decide, based on the credible evidence, whether Officer
9 McGrath used force maliciously and sadistically for the
10 purpose of causing harm against Joseph Tranchina or, as
11 we submit, did he use force in a good faith manner to
12 restore the situation and to protect himself as he
13 thought he was under attack.

14 We told you at the beginning of this that the
15 case was going to be straightforward. Our proof and
16 witnesses we believe have testified that this was
17 nothing more than a routine pat frisk at a dangerous
18 medium security facility. So dangerous that, as Officer
19 Hurteau put it, they have to have people just monitor
20 the inmates on the walkway.

21 You will hear instructions from the judge and,
22 as counsel indicated, plaintiff has the burden in this
23 matter. They have to tip the scale, not the defendant.
24 For -- so we need to look at Mr. Tranchina's story. I'm
25 not really sure which one we can start with but we think

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1 the proof has been that there's been different versions
2 presented even as soon as the next day or a few days
3 after that.

4 So, to believe in Mr. Tranchina's story, we
5 submit that you have to buy into a grand conspiracy of
6 several officers corroborating together who, because of
7 a note that was passed, that they would take this action
8 against Mr. Tranchina. But we have heard lots of
9 testimony that these officers did not even really know
10 each other, that there was a lot of turnover at Bare
11 Hill Correctional Facility.

12 So let's look at three crucial legs of
13 plaintiff's story they are trying to stand on right now.

14 The first, that Mr. McGrath planted the shank.
15 Mr. Tranchina has not put forth any evidence, not even a
16 reason, as to how Mr. McGrath got the shank.

17 Mr. Tranchina has trotted out a DNA forensic
18 scientist, but on the stand we all heard her, she
19 indicated that she could not rule out that Mr.
20 Tranchina's DNA was on the weapon, that there were at
21 least three other contributors, that she could not
22 compare Mr. Tranchina's cheek swab against on that
23 weapon.

24 We have indicated that almost every officer
25 has -- has every officer that has testified that there's

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1 Plexiglas in the facility. Mr. Hurteau said that it was
2 missing from the working chill room, Mr. Barnaby has
3 testified that he saw morning reports around the time of
4 the incident in question that had photos of Plexiglas
5 shanks.

6 We submit that the evidence is that
7 Mr. Tranchina could have access to a Plexiglas shank and
8 there were plenty of testimony about contraband problems
9 at Bare Hill.

10 The second thing of the story, the note.
11 There's been no testimony that Mr. McGrath knew who
12 passed the note to Maura Mayer at the time of the
13 incident. As Mr. McGrath said in his testimony, this is
14 what inmates do. You can't take it personally.

15 So, how do they try to distract us? They have
16 this story about a relationship between Mr. Tranchina
17 and Miss Mayer. She was here today. You watched her.
18 Who do you believe?

19 Plaintiff's own story with respect to Miss
20 Mayer isn't even consistent. He said that she gave him
21 snacks from the commissary; she testified that she
22 didn't even know where the commissary was. He said in
23 one of his statements that you can review which is in
24 evidence that they smoked; she testified that she
25 doesn't smoke.

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1 His own statements indicate that they never
2 kissed. He testified here that they did kiss. There's
3 testimony from -- there's, again, that same statement in
4 evidence that there was two different people who saw
5 these exchanges between Mr. Tranchina and Miss Mayer.
6 One of them was Mr. Goode. None of these people have
7 come here to testify today.

8 I query this. If Maura actually did what
9 Mr. Tranchina has alleged and testified to, why would
10 she out herself that she received a note? She is
11 essentially admitting that they are engaged in a
12 relationship. It doesn't make any sense.

13 The last leg, the chart that Mr. McGrath
14 somehow put his name on that chart so he could be at the
15 school annex on the day in question. We didn't even get
16 to see the official chart. What we heard was that this
17 was a cheat sheet and that there's a 14-page chart out
18 there. Now, Lieutenant Conto testified, but his
19 testimony was clear that on a 24-hour period, there were
20 approximately 14 people -- deputies, captains,
21 lieutenant, sergeants -- all who could have added to
22 that chart.

23 Mr. Barnaby's testimony was that he requested
24 to the watch commander that someone pat frisk at the
25 school annex on the day -- on the day before the

1 incident because of tobacco and what did Lieutenant
2 Canto say? That inmates hide -- so it all ties
3 together. Inmates hide drugs in tobacco. So that's why
4 they would have someone down there to pat frisk.

5 Why would Mr. Tranchina put this all together?
6 Let's look to his own testimony. He testified that he
7 knew contraband could lengthen his sentence, and he
8 testified that his prison philosophy was to survive. He
9 also had testimony that he knew about the loss of
10 privileges. As he says, he didn't want to leave the day
11 camp.

12 So, what does he do? Note was passed. He is
13 smitten with Miss Mayer. He's caught, he's taken to
14 SHU, he has a couple of hours to reflect on the
15 consequences, and what has Mr. McGrath's testimony been?
16 He has been on F-2 and there's been testimony that
17 there's open sight lines, so Mr. Tranchina puts it all
18 together and he has his story so he can avoid leaving
19 day camp.

20 So, you have to decide what's more plausible
21 to you, and I think another indication of this in the
22 evidence is looking at the injuries that the attorney
23 general's office has just discussed.

24 Mr. Tranchina's testimony is that he was
25 severely beaten for somewhere between one and a half and

1 three minutes. The length of it is indicated in the
2 testimony is different every time he's asked about it.

3 If I sat here for just one and a half minutes,
4 it would be incredibly awkward. So think about how much
5 can transpire during that minute and a half.

6 Mr. Tranchina's testimony was that he was
7 punched at least 40 to 50 times, that he was kicked
8 twice in the vestibule area, and that he was kicked
9 again in SHU. His own testimony here contradicts prior
10 statements about the kicks but think about all those
11 actions and look at those pictures and you have to ask
12 yourself whether those injuries are consistent with
13 someone who received a beating of that nature.

14 If you look to P-31, he told the nurse that
15 his pain was a six out of ten, not that, as he testified
16 here, he thought he was near the end. Mr. Tranchina's
17 own statement is belied by where it takes place. He
18 can't even get right where the pat frisk took place.

19 We have walked through photos in evidence of
20 that small vestibule area. Mr. Tranchina's testimony
21 was that the pat frisk took place on -- excuse me --
22 that the radiator was on the left side of the vestibule
23 area.

24 If you look through the testimony of Officer
25 McGrath and how we walked him through those two

1 pictures, the radiator is on the other side. The pat
2 frisk took place on the left side, lining up with
3 Officer McGrath's story how he takes Mr. Tranchina to
4 the ground, and it is a small area, the radiator is
5 behind him. They both fall. Mr. Tranchina's ribs hit
6 the radiator and then he falls to the ground. The
7 ground, the radiator, what are the injuries more
8 consistent with?

9 So, we have asked you here to use your common
10 sense. Was Officer McGrath assigned to randomly pat
11 frisk in a facility like he had testified to he had done
12 in the past. You heard testimony about contraband being
13 in the facility. Mr. McGrath did not know when he
14 arrived at work that day that he would be in the school
15 annex. He was a resource officer. He never knew where
16 he was going to be and, yes, he did pat frisk with
17 inmates walking behind him. So he would have zero
18 expectation of privacy when this was taking place. If
19 he was actually going to plant a shank on Mr. Tranchina,
20 why would he try to do it there when other inmates are
21 walking behind him? It just doesn't add up.

22 Mr. McGrath and Miss Mayer have indeed lost
23 their jobs but Mr. McGrath finally has his real day in
24 court. We submit that based on the evidence before you,
25 you should end the saga for them and return a verdict in

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1 our favor. Thank you.

2 THE COURT: Thank you, Mr. Miranda.

3 Mr. Roche.

4 MR. ROCHE: Thank you, your Honor. Good
5 afternoon, everybody. I would just like to join
6 everybody else and thank you too. You guys really
7 stepped up to the -- to be jurors in this case and my
8 client and my co-counsel appreciate that.

9 So it's pretty clear, very clear at this point
10 that Defendant McGrath and Defendant Barnaby both lied
11 to you about matters -- large matters, small matters,
12 many different matters here in court.

13 Mr. McGrath clearly lied when he testified
14 that it was normal practice to conduct a frisk in a tiny
15 little vestibule between an exit door and the door into
16 the facility. He was adamant, no, there's nothing wrong
17 with that, there's no security concerns, not a problem.

18 We finally heard from Lieutenant Conto today
19 who testified very credibly that, no, that's not
20 something that would be something that would be
21 practiced at the facility and he said that indeed there
22 would in fact be major security concerns with inmates
23 passing by the back of the officer out of his range of
24 sight by his conducting a pat frisk of another inmate.
25 Of course that makes sense. It's total common sense but

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1 Lieutenant Conto confirmed it for us today as a
2 supervisor in that very facility.

3 Mr. McGrath also lied about when he first
4 started dating Maura Mayer. Of course he doesn't want
5 you to believe that he had a motive for assaulting
6 Mr. Tranchina, so he wants you to -- he wants you to
7 believe that he wasn't, that he -- they were just
8 friends, and they were just starting to get to know each
9 other, but there was no real connection between them,
10 there was no real relationship that would make him
11 jealous or that would make him defensive of her or
12 protective of her at that time but we know that's a lie
13 and we know that Miss Mayer lied about it too.

14 She came in, she testified today, she cried,
15 but you heard that after -- a few months after the
16 incident, she gave sworn testimony to an investigator.
17 She was under oath, just like she was here, and she
18 testified that she had begun dating Mr. McGrath in
19 December of 2015. New Year's Eve to be precise.

20 She said she tried to -- to pass it off as,
21 oh, you know, I got confused, I don't remember the date.
22 New Year's Eve is -- is a memorable event. So if you
23 start to date somebody on New Year's Eve, you can be
24 pretty sure that that's accurate but of course now
25 there's an incentive, there's a motive to deny that and

1 to pretend that there wasn't a relationship at that
2 time.

3 And Mr. McGrath also lied to you when he told
4 you that it was -- you were not required to sign the
5 logbook in the annex school. He said, oh, you sign the
6 logbook in the main school but not the annex school. Of
7 course it didn't really make sense, didn't make any
8 sense but, once again, Lieutenant Conto came in today,
9 very matter of factually said, no, you -- you -- it's
10 standard practice that you -- given a frisk assignment
11 to -- assignment unit, it would be entered in the
12 logbook. So he lied and he -- he -- the reason he lied
13 is because he doesn't want you to believe that there was
14 anything improper about what he was doing that day.

15 The mystery of the chart, the -- the chart
16 entry or -- I can't remember what Lieutenant Conto
17 referred to it as today but the -- basically the chart
18 that he testified about that he had written down
19 McGrath's name and somebody else had written in the
20 assignment. The assignment of a frisk in the annex
21 school. That hasn't been resolved but Sergeant Conto
22 said he didn't write it and he was unable to determine
23 what sergeant wrote it, and we know that OSI
24 investigated that very matter and if they had resolved
25 it in Mr. McGrath's favor, you can be sure we would have

1 heard about it here in this courtroom but you did not.

2 And Mr. McGrath is -- sorry. And another
3 thing that Mr. McGrath lied to you about was being able
4 to identify an inmate from his cube number. Both
5 Miss Mayer and Mr. McGrath both testified that she --
6 when she told him about the note, she told -- also told
7 him about the cube number of the inmate that -- that
8 passed the note to her, and from what Lieutenant Conto
9 told us today and Miss Mayer actually confirmed it, was
10 that you can absolutely identify an inmate from their
11 cube number. Lieutenant Conto told you there's a list
12 in each dorm of the inmates -- list of the cubes and the
13 name of the inmate beside it.

14 We knew -- we know from Sergeant McGrath that
15 he visited the F-2 dorm so it would be an easy matter
16 for him to find out the name of the inmate and that's
17 even if you believe, to begin with, that she didn't just
18 tell him the name. She admitted at one point to telling
19 him the cube number but she also said that it's --
20 that corrections officers often refer to the inmates by
21 their cube number, which is a clear identifier. So he
22 lied about that too.

23 And officer or Mr. McGrath is not the only one
24 that lied. Sergeant Barnaby did too. He told some of
25 the same. He also lied about the frisk in the

1 vestibule. He's a sergeant, he's a supervisor, and he
2 told you that there's nothing wrong with that, like
3 there's no security concerns. It's up to the discretion
4 of the officer, nothing surprising or weird about it.
5 Lieutenant Conto you heard, no, that's not correct. It
6 is a security concern.

7 Of course both McGrath and Barnaby want you to
8 believe that this was just a routine assignment rather
9 than a ruse to beat down an inmate that -- that he had a
10 grudge against, that McGrath had a grudge against.

11 Barnaby also lied about the annex logbook in
12 the same way. He also said that no, you don't sign into
13 that logbook for a frisk assignment. A lie. Lieutenant
14 Conto told us. Sergeant Barnaby also lied about the
15 officers -- for being officers who enter the vestibule
16 before him right after the incident.

17 He said that when he got there, there were
18 other officers in there. We heard from Officer Hurteau
19 today who said that when he responded, he responded
20 right away and took him -- I think -- I don't remember
21 exactly what he said but maybe 45 seconds and when he
22 got there, there was nobody in there except for Sergeant
23 Barnaby who had already gone inside the school.

24 And the number one reason that we all know
25 that both of them are lying is the injuries. We saw the

1 photos of the injuries. The injuries to Mr. Tranchina
2 are significant. They are not the kind of injuries that
3 you get from being bear hugged, twisted around, maybe
4 hitting -- even if hitting a radiator and hitting the
5 ground.

6 These are multiple injuries all over his face,
7 head, and body, including a broken rib, swollen
8 abrasions to both sides of his face. You saw the photos
9 and the defendants' account of how that -- those
10 injuries were inflicted is preposterous. I'm not even
11 going to insult your intelligence by arguing how those
12 injuries could not have been caused by rolling around in
13 rock salt on the floor. It's too absurd.

14 It's clear that Mr. Tranchina was beaten and
15 of course they can't admit it, so they come up with a
16 ridiculous story to justify it, and it's not just
17 McGrath that's lying about how the injuries occurred,
18 Barnaby is, too.

19 Barnaby is the sergeant who responded. He's
20 responsible for this area, so it's his responsibility to
21 find out what happened and to deal with it
22 appropriately. So he arrives on the scene and he sees
23 an inmate who's badly beaten, but they, you know -- the
24 photos show he's badly beaten inmate, and he sees an
25 officer with the skin removed from his knuckles.

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1 Ladies and gentlemen, come on. It's not
2 difficult to figure out what happened here. Now,
3 Barnaby says he didn't see the injuries in the vestibule
4 but he went to the infirmary with Mr. Tranchina. He was
5 there while the medical examination was taking place.
6 He received the report from Nurse Mulverhill documenting
7 the many injuries that Mr. Tranchina had sustained but
8 yet he didn't go back and change his assessment, he
9 didn't go back to McGrath and say, hey, there's some --
10 I got some issues with this, this isn't very credible.
11 He didn't do that. He just took McGrath's account and
12 passed it up the chain of command.

13 Now, eventually the truth was discovered and
14 McGrath was fired. You heard that. So why would -- why
15 would Barnaby, why would he put himself, his career at
16 risk to lie for McGrath? There's only one plausible
17 explanation, and that's that he committed an act of
18 violence too, just like Mr. Tranchina told you that he
19 did.

20 Mr. Tranchina told you that when Barnaby
21 entered the vestibule, he, first of all, felt relief but
22 then Barnaby kicked him in the side of the face. By
23 doing that, Barnaby put himself in the same boat as
24 McGrath, and they had to be a team to cover it up, and
25 that's exactly what they did and that's exactly why

1 Barnaby took McGrath's ridiculous explanation of what
2 happened and passed it up the chain of command.

3 And you also -- you heard that not alone did
4 Barnaby file that report, his to-from memo basically
5 just parroting McGrath's account, he also testified
6 at -- he also allowed a false misbehavior report to be
7 filed, false use-of-force report and then he went to an
8 infraction hearing and testified on behalf of the
9 officer.

10 Now, one of the defense counsel mentioned that
11 we didn't prove where the knife came from. How the --
12 how could a lawyer for a former inmate prove how
13 a Plexiglas shank was -- could be found by a corrections
14 officer in a correctional facility? Obviously would not
15 be too difficult. We heard testimony that weapons --
16 makeshift weapons are recovered all the time, they are
17 placed in the evidence drawer. So if McGrath had wanted
18 to plant one, it's -- it's pretty obvious that that
19 would not be too difficult for him to do.

20 We heard from Barnaby that he initially had
21 stated that McGrath had told him in the vestibule that
22 the weapon that he had found was a ice pick-type weapon.
23 Well, obviously McGrath wasn't able to find the ice pick
24 that he thought he knew was somewhere, so he had to find
25 another weapon instead, and of course when Barnaby sees

1 the new weapon, he doesn't question as to, hey, I
2 thought you said it was an ice pick. Never said that.

3 Now, you heard from Mr. Tranchina and he told
4 you about what he went through that day, and he told you
5 that when he was brought to the SHU, and when he was
6 interviewed by or when he was examined by the nurse, at
7 that time he was -- he was terrified. He was afraid to
8 say anything about what had happened, for good reason.
9 Because not alone has he just been pummeled very
10 seriously, to the point where he credibly said that he
11 was about to pass out, never said he lost consciousness.
12 He said he felt like and he feared that he was going to
13 lose consciousness.

14 So, is it any wonder that he wouldn't -- when
15 he's brought to the SHU that -- where Sergeant Barnaby,
16 who kicked him in the head, is still present, still
17 there right up on the -- after the time that he's
18 examined, is it any wonder that he told the nurse that
19 he didn't have anything to say. But you heard because
20 of his injury, because he -- he -- the word suspected
21 fractures of his face and his ribs, turns out his face
22 was not fractured, x-rays revealed that, his rib was
23 fractured but he had to be transported to a different
24 facility to get the medical care that he needed.

25 And once he got to that other medical

1 facility, Franklin, he wrote a note immediately
2 explaining what happened to him, and I believe that note
3 is in evidence and you can read it, and you'll see it's
4 very consistent with what Mr. Tranchina told you here in
5 court.

6 And it's significant that Mr. Tranchina, when
7 he's investigating -- the next day when he's interviewed
8 by the OSI investigators and he finds out that he's --
9 there's an allegation that he possessed a weapon, the
10 first thing he said is take my DNA, compare it with my
11 DNA, it won't be on there, it was planted. It's --
12 lying about it, it was never on me and of course the
13 DNA -- you heard from the DNA expert today, his DNA was
14 not found on the knife.

15 And you also heard another -- getting back to
16 the lies, you also -- you heard that Mr. McGrath, his
17 explanation for, you know, why there's no DNA on the
18 knife is he claims that -- that Mr. Tranchina was
19 wearing long johns and the knife was somehow between
20 long johns and his pants and sock or somehow that the
21 knife was not touching his skin, but you will see from
22 the reports that are in evidence he wasn't saying that
23 in the beginning. He said he recovered this knife in
24 Mr. Tranchina's sock, which of course his DNA would be
25 on the item if it had been in his sock.

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1 So the judge will instruct you that if you --
2 if you as jurors find that a witness has testified
3 falsely about a material issue and fact, you are
4 entitled to disregard that witness's entire testimony,
5 and I submit that that's exactly what you should do for
6 both of these defendants.

7 They both came in here in federal court, swore
8 to tell the truth before Judge D'Agostino, and they both
9 lied to you about a very serious matter, about an
10 assault on a defenseless inmate and a coverup.

11 These defendants brutally beat Mr. Tranchina
12 on January 28th, 2016. I'm going to ask you to hold
13 them accountable.

14 The judge told you at the beginning of the
15 case even though Mr. Tranchina was an inmate and had
16 been convicted of crimes at the time of this incident,
17 that doesn't mean he gives up his Constitutional rights,
18 and this -- the Constitutional right to be free from
19 cruel and inhuman punishment is obviously a very
20 important right that nobody should ever have to give up
21 no matter what their convictions and these defendants
22 brutally violated that right of Mr. Tranchina.

23 Both of them assaulted him and Defendant
24 Barnaby also failed to intervene to stop McGrath, who he
25 was the supervisor of, to stop him from continuing the

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1 beating.

2 Now, one of the defense counsels commented on
3 some inconsistencies in Mr. Tranchina's testimony about
4 where exactly he was positioned in the vestibule when
5 the beating took place and how long it took, how many
6 blows he sustained. Think about it. Let's think about
7 the beating that Mr. Tranchina described and was
8 corroborated by the photos that you all have seen.

9 Would you really expect somebody who's just
10 had their legs pulled from them, fall on the floor and
11 then is being beaten while he doesn't know why, he
12 doesn't know why at that point. Later on he kind of
13 figures it out but he's getting brutally beaten inside
14 this tiny enclosed area where nobody can see.

15 You really think that he's going to be
16 counting the blows or estimating the amount of time that
17 passed? Or that he's, you know -- he's paying attention
18 to where exactly his body is aligned with one or two
19 identifiable items in the room? Of course not. Of
20 course not.

21 He told you what he was concerned about was he
22 didn't want to lose consciousness because he was afraid
23 what would happen, and he just wanted to stay awake, and
24 it's somewhat ironic that the defendants are trying to
25 harp on Mr. Tranchina's disorientation, when any

1 disorientation he might have been experiencing was
2 exactly from the beating that these defendants were
3 dishing out.

4 So, I'm going to ask you to award damage to
5 Mr. Tranchina for what he suffered, and I'm going to
6 just ask you to -- to bear with me, run through the
7 events that he experienced because, really, the damages
8 should start the moment that he was put up against the
9 wall, that Officer McGrath tells him to get up against
10 the wall for the pat frisk because there was no reason
11 for that pat frisk.

12 It was a ruse. It was clearly because he
13 wanted to beat him up and then when he is undergoing
14 this -- this pat frisk, the officer pulls his legs from
15 under him and makes him come cascading to the floor and
16 then starts beating him.

17 Just try and put yourself into Mr. Tranchina's
18 position. How terrifying must that be? It's bad enough
19 being an inmate having your liberty taken from you but
20 to be in a situation where you're utterly helpless,
21 being beaten by an officer who has authority and power
22 over you and that that beating continued.

23 Now, whether or not Mr. Tranchina's estimate
24 of how many blows there were is accurate, is beside the
25 point. It felt like countless blows to him and then

1 finally, when the door opens and feels his first moment
2 of relief that maybe this is going to end, Sergeant
3 Barnaby walks in and gives him another kick in the head.
4 Can you imagine how that felt?

5 If he's in this bleak situation, one little
6 moment of hope and then it gets snuffed out by another
7 violent attack. Then he's falsely charged with
8 possessing a knife. He has to go through an infraction
9 hearing, a trumped-up infraction hearing which he's
10 found guilty and he gets 210 days in solitary
11 confinement and after that, gets transferred to a
12 maximum security prison where he was terrified because
13 he absolutely did not belong there.

14 Ladies and gentlemen, these defendants
15 gratuitously inflicted pain and suffering on
16 Mr. Tranchina. Make no mistake. The trauma, the
17 emotional trauma for something like this doesn't end
18 when the incident is over. Doesn't end when he gets
19 released from solitary confinement. It doesn't end when
20 the charges, the guilty verdict and infraction hearing
21 is overturned and the officer who brought the false
22 claim against you is fired.

23 No. The injury continues. It's a very
24 traumatic thing that will be with him for a long time if
25 not his whole lime. So for -- as to the amount of

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1 damages that I would suggest, obviously, you know, it's
2 hard to come up with what the appropriate number is, and
3 you guys go in to the jury room and you will discuss
4 what you think is appropriate, and I submit that each of
5 you will, you know, probably come up with a different
6 suggestion but, you know, you will figure it out among
7 yourselves but what I would suggest as an amount that
8 would be an appropriate award for a compensatory damages
9 for this case would be as to Defendant McGrath I would
10 ask -- I would suggest the figure of 300,000 in
11 compensatory damages, and as to Defendant Barnaby,
12 \$150,000.

13 And I will also ask you to consider punitive
14 damages and just for punitive damages, which, you know,
15 as we discussed in jury selection, punitive damages --
16 compensatory damages are to compensate for the pain and
17 the suffering that he experienced. Punitive damages
18 focuses on the defendants on what their conduct was.

19 And really, what could be more egregious than
20 creating a ruse whereby a person is brought into an
21 enclosed space, is subjected to a pretextual frisk and
22 then brutally, brutally beaten. Like what excuse can
23 there be for that? What mitigating circumstances can
24 there be for Officer McGrath? There's no excuse. He
25 may have been, you know, upset with Mr. Tranchina for

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1 hitting on his girlfriend. You know. There's -- that's
2 not -- that's somewhat understandable but to act on it
3 like this? To take it upon yourself to brutally beat a
4 person who hasn't done anything violent, who hasn't
5 harmed anybody is absolutely outrageous.

6 Same thing with Sergeant Barnaby. Like, what
7 he did, he was the supervisor. He was the person who is
8 supposed to be the authority figure, the adult in the
9 room, the person who should stop this kind of conduct
10 from happening, and he was the first person on the
11 scene, the first person to enter the vestibule, and he
12 could have put a stop to it, to what McGrath was doing
13 but, instead, he decided that it was an opportunity for
14 himself, for him to inflict his own measure of violence,
15 and he kicked Mr. Tranchina in the head.

16 I submit that that's egregious conduct that is
17 deserving of punishment. Both of them deserve to be
18 severely punished. I'm not going to suggest a number
19 for punitive damages at this time but we may have an
20 opportunity to ask for that later. Okay. Thank you,
21 ladies and gentlemen.

22 THE COURT: Thank you, Mr. Roche.

23 Members of the jury, I'm now going to instruct
24 you on the law. I want to let you know that I will be
25 sending eight copies of what I am saying right now into

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1 the jury deliberation room for you so that each one of
2 you will have a copy of my words. I am required,
3 however, to orally go through the charge with you.

4 Now that you have heard all the evidence and
5 the arguments of counsel, I must instruct you on the law
6 applicable to this case. You must base your decision on
7 this charge and not on the instructions that I gave you
8 at the beginning of the case.

9 Your duty as jurors is to determine the facts
10 of this case on the basis of the admitted evidence.
11 Once you have determined the facts, you must apply the
12 law as I am now instructing you to those facts. You
13 must consider and apply all of these instructions. You
14 may not elect to apply some and omit others. It is the
15 application of these instructions in their entirety that
16 states the law.

17 You should not concern yourselves with the
18 wisdom of any rule of law. You are bound to accept and
19 apply the law as I give it to you, whether or not you
20 agree with it.

21 In deciding the facts of this case, you must
22 not be swayed by feelings of bias, prejudice or sympathy
23 toward either the plaintiff or the defendants. You are
24 not to consider what the parties' or the public's
25 reactions to your verdict may be, whether or not it will

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1 please or displease anyone, be popular or unpopular.
2 Indeed, any consideration outside the case as it has
3 been presented to you in this courtroom.

4 You should consider only the evidence, both
5 the testimony and the exhibits and apply the law as I
6 now give it to you. The proper administration of
7 justice requires that you carefully and impartially
8 consider all the evidence in the case, follow the law as
9 the Court states it, and render a decision based upon
10 the application of the law to the facts as you find them
11 to be.

12 Nothing I say in these instructions is to be
13 taken as an indication that I have any opinion about the
14 facts of the case. It is not my function to determine
15 the facts. It is yours.

16 In addition, you must not infer from anything
17 I have said during this trial or anything that I have
18 done that I hold any views for or against either the
19 plaintiff or the defendant. In any event, any opinion
20 that I might have is totally irrelevant to the decisions
21 that you will make.

22 Our courts operate under an adversary system
23 in which we hope that the truth will emerge through the
24 competing presentation of opposing parties. It is the
25 responsibility of the attorneys to press as hard as they

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1 can for their respective positions. It is their role to
2 call your attention to those facts which are most
3 helpful to their side of the case.

4 In fulfilling that role, they have not only
5 the right but also the obligation to make objections to
6 the introduction of evidence that they believe is
7 improper. The application of the rules of evidence is
8 not always clear and the lawyers will often disagree.
9 It's been my job as judge to resolve those disputes.

10 It is important for you to realize, however,
11 that my rulings on evidentiary matters have nothing to
12 do with the ultimate merits of the case and are not to
13 be considered as points scored for one side or the
14 other.

15 Also, one cannot help but become involved with
16 the personalities and the styles of the attorneys, but
17 it is important for you as jurors to recognize that this
18 is not a contest between attorneys.

19 You are to decide this case solely on the
20 basis of the evidence and remember that the attorneys'
21 statements and their characterizations of the evidence
22 are not evidence.

23 As I've said, insofar as you find their
24 opening statements and their closing statements helpful,
25 take advantage of them, but it is your memory and your

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1 evaluation of the evidence that counts.

2 Questions asked by attorneys are also not
3 evidence. Only the witnesses' answers are evidence. In
4 addition, as I've said, you must not infer from anything
5 I've said during this trial or anything that I did that
6 I hold any view for or against either the plaintiff or
7 the defendants. As I said, any opinion that I might
8 have is totally irrelevant to your decision.

9 It is your duty to determine the facts based
10 on the evidence that has been admitted. The term
11 "evidence" includes the sworn testimony of witnesses,
12 exhibits that the Court has received and any
13 stipulations.

14 You may not consider any responses which I
15 ordered stricken from the record. Now, I realize that
16 you can't remove those answers from your memories, but I
17 instruct you as a matter of law that you may not rely on
18 them during your deliberations. As I have indicated
19 before, I instruct you that you are not to consider a
20 question asked by the attorneys as evidence.

21 Although you should consider only the admitted
22 evidence, you may draw inferences from the testimony and
23 exhibits which are justified in light of your common
24 experience.

25 As I have explained in my preliminary

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1 instructions, the law recognizes two types of evidence:
2 direct and circumstantial.

3 Direct evidence is the testimony of one who
4 asserts personal knowledge, such as an eyewitness.
5 Circumstantial evidence or indirect evidence is proof of
6 a chain of events which points to the existence or
7 nonexistence of certain facts. Again, the use of logic.

8 The law does not distinguish between the
9 weight to be given to direct or circumstantial evidence,
10 nor is a greater degree of certainty required of
11 circumstantial evidence than of direct evidence. You
12 may rely on both types of evidence in reaching your
13 decision.

14 To say that a party has the burden of proof on
15 a particular issue means that considering all of the
16 evidence in the case, the party's claim on that issue
17 must be established by what we call a fair preponderance
18 of the evidence. The credible evidence means the
19 testimony and exhibits that you find worthy of belief.

20 A preponderance means the greater part of the
21 evidence. It does not mean the greater number
22 of witnesses or the greater length of time taken by
23 either side. The phrase preponderance of the evidence
24 refers to the quality of the evidence, its weight and
25 its effect it has on your minds. In order for a party

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1 to prevail on an issue on which it has the burden of
2 proof, the evidence that supports its claim on that
3 issue must appeal to you as more nearly representing
4 what happened than that opposed to it.

5 If it does not, or if it weighs so evenly that
6 you are unable to say that there is a preponderance on
7 either side, you must decide the question against the
8 party that has the burden of proof and in favor of the
9 opposing party.

10 You have now had the opportunity to observe
11 all of the witnesses. Now it's your job to decide how
12 believable each witness was. You are the sole judges of
13 the credibility of each witness and the importance of
14 his or her testimony.

15 Now, in evaluating a witness's testimony, you
16 should use all of the tests for truthfulness that you
17 would use in determining matters of importance to you in
18 your everyday lives. You should consider any bias or
19 hostility that the witness may have shown for or against
20 either party, as well as the interest that witness has
21 in the outcome of the case.

22 You should also consider the specific
23 attributes of the witness. For example, whether the
24 witness has been convicted of a felony, that is a crime
25 for which a person may serve a prison sentence for more

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1 than one year.

2 You should consider the opportunity the
3 witness had to see, hear, and know the things about
4 which the witness testified; the accuracy of the
5 witness's memory, candor or lack of candor; the
6 reasonableness and the probability of the witness's
7 testimony; the testimony's consistency or lack thereof
8 and its corroboration or lack of corroboration with
9 other credible testimony.

10 Inconsistencies or discrepancies in the
11 testimony of a witness or between the testimony of
12 different witnesses may or may not cause you to
13 discredit such testimony. Two or more persons
14 witnessing an incident or a transaction may see it or
15 hear it different. An innocent misrecollection. Like
16 failure of recollection is not an uncommon experience.

17 In weighing the effect of a discrepancy,
18 always consider whether it pertains to a matter of
19 importance or an unimportant detail and whether the
20 discrepancy results from innocent error or intentional
21 falsehood.

22 If you were to find that any witness willfully
23 testified falsely as to any material fact, that is, to
24 an important matter, the law permits you to disregard
25 completely the entire testimony of that witness upon the

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1 principle that one who testifies falsely about one
2 material fact is likely to testify falsely about other
3 important matters. You are not required, however, to
4 consider such a witness as totally unworthy of belief.
5 You may accept as much of that witness's testimony as
6 you deem true and disregard what you feel is false.

7 By the processes which I have described, you,
8 as the sole judges of the facts, decide which of the
9 witnesses you will believe, what portion of the
10 testimony you accept, and what weight you will give to
11 that testimony.

12 In other words, what you must try to do in
13 deciding credibility is to size up a witness in light of
14 the witness's demeanor, the explanations given, and all
15 of the other evidence in the case. Remember, you should
16 also always use your good common sense, your good
17 judgment and your own life experience. Also remember
18 that the existence or nonexistence of a fact is not
19 determined by the number of witnesses called. Your
20 concern always has to be with the quality, not the
21 quantity, of the evidence.

22 In evaluating the credibility of witnesses,
23 you should take into account any evidence that the
24 witness who testified may benefit in some way from the
25 outcome of this case. Such an interest in the outcome

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1 creates a motive to testify falsely and may sway the
2 witness to testify in a way that advances his or her own
3 interests.

4 Therefore, if you find that any witness whose
5 testimony you are considering may have an interest in
6 the outcome of the trial, then you should bear that
7 factor in mind when evaluating the credibility of his or
8 her testimony and accept it with great care.

9 This is not to suggest that every witness who
10 has an interest in the outcome of the case will testify
11 falsely. It's for you to decide to what extent, if at
12 all, the witness's interest has affected or colored his
13 or her testimony.

14 Now, a witness may be discredited or impeached
15 by contradictory evidence or by evidence that at some
16 other time the witness had said or done something or has
17 failed to say or do something that is inconsistent with
18 the witness's present testimony. If the witness is not
19 a party to this action, such prior inconsistent,
20 out-of-court statements may be considered for the sole
21 purpose of judging the witness's questionability.
22 However, it may not be considered as evidence of proof
23 of the truth of the statement.

24 On the other hand, where the witness is a
25 party to the case and by such statement or other conduct

1 admits some fact or facts against the witness's
2 interest, then such statement or other conduct, if
3 knowingly made or done, may be considered as evidence of
4 the truth of the fact or facts so admitted by such
5 party, as well as for the purpose of judging the
6 credibility of the party as a witness.

7 If you believe any witness has been impeached
8 and thus discredited, you may give the testimony of that
9 witness such credibility, if any, you think it deserves.
10 If a witness has shown to have testified falsely about
11 any material matter, as I said previously, you have the
12 right to distrust such a witness's other testimony and
13 you may reject all the testimony of that witness or give
14 it such credibility as you think it deserves.

15 You have heard evidence that the plaintiff has
16 been convicted of crimes. You may consider that
17 evidence only in deciding whether the testimony provided
18 by that person is truthful in whole, in part, or not at
19 all. Such a conviction does not necessarily destroy the
20 witness's credibility but it is one of the circumstances
21 you may take into account in determining the weight to
22 give his testimony. You may not consider this evidence
23 for any other purpose.

24 You must give separate consideration to each
25 claim and each party in this case. Although there are

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1 two defendants, it does not follow that if one is
2 liable, the other is also liable.

3 In considering a claim against a defendant,
4 you must not consider evidence admitted only against
5 another defendant.

6 The law does not require any party to call all
7 witnesses or all persons who may have been present at
8 any time or place involved in the case or who may appear
9 to have some knowledge of the matters in issue at the
10 trial, nor does the law require any party to produce and
11 submit all papers and all things mentioned in the case.

12 You have heard testimony from corrections
13 officers. The fact that a witness is employed as a
14 corrections officer does not mean that his testimony is
15 deserving of any more or less consideration or should be
16 given any greater or lesser weight than that of any
17 other witness from whom you have heard testimony.

18 At the same time, it's quite legitimate for
19 counsel to attempt to attack the credibility of
20 correction officers' witnesses. It's your decision,
21 after reviewing all of the evidence, to accept the
22 testimony of correction officers' witnesses or to reject
23 it, or to give it whatever weight you believe it
24 deserves just as you would any other witness from whom
25 you heard testimony.

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1 A stipulation is an agreement between the
2 parties that a certain fact is true. You must regard
3 such agreed upon facts as true.

4 I'm now going to talk to you about what we
5 call the substantive claims in this case.

6 Plaintiff has brought his claim pursuant to
7 42 United States Code, Section 1983, which provides that
8 every person who, under color of any statute, ordinance,
9 regulation, custom or usage of any state, subjects or
10 causes to be subjected any citizen of the United States
11 or other person within the jurisdiction thereof to the
12 deprivation of any rights, privileges or immunities
13 secured by the Constitution and laws, shall be liable to
14 the party injured. I will now refer to this statute
15 simply as Section 1983.

16 Section 1983 does not create any substantive
17 right in and of itself but, rather, it serves as a means
18 by which individuals can seek redress in this court for
19 alleged violation of their substantive rights under the
20 constitution.

21 One element of any claim under Section 1983 is
22 that the acts of the defendant be done under color of
23 state law. In other words, the acts complained of must
24 have occurred while the defendant was acting or
25 purporting to act in the performance of his or her

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1 official duties.

2 It is important to remember, however, that the
3 State of New York is not a defendant in this case. The
4 defendants in this case are Justin McGrath and Matthew
5 Barnaby who were employees of the State of New York
6 Department of Corrections and Community Supervision at
7 Bare Hill Correctional Facility during the time in
8 question.

9 Further, the plaintiff must establish by a
10 preponderance of the credible evidence that the
11 defendants' conduct deprived him of a right secured by
12 the Constitution or federal law.

13 Here, plaintiff claims the defendants used
14 excessive force against him and failed to protect him,
15 in violation of the Eighth Amendment of the
16 United States Constitution.

17 Third: The plaintiff must establish that any
18 injuries he may have sustained were proximately caused
19 by the defendants' alleged unconstitutional conduct.

20 I will now discuss the actual deprivations
21 that plaintiff alleges defendants caused.

22 First, excessive force. In this case, you
23 heard testimony that at all times relevant, plaintiff
24 was an inmate incarcerated at Bare Hill Correctional
25 Facility.

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1 When a state takes a person into its custody
2 and holds him there against his will, the Constitution
3 imposes upon him a corresponding duty to assume some
4 responsibility for the safety and general well-being of
5 that person.

6 As you have heard plaintiff alleges that the
7 defendants McGrath and Barnaby used excessive and
8 unnecessary force against him in a an incident that
9 occurred while the plaintiff was incarcerated. The use
10 of excessive force may, under some circumstances,
11 constitute cruel and unusual punishment, in violation of
12 the Eighth Amendment.

13 To prove his claim of excessive force, the
14 plaintiff must prove each of the following elements by a
15 preponderance of the credible evidence:

16 First, that the defendant you are considering
17 acted under color of state law; second, that the
18 defendant you are considering acted maliciously and
19 sadistically; and third, that plaintiff suffered an
20 injury as a result of that particular defendant's
21 conduct.

22 The parties agree in this case that the
23 defendants were acting under color of state law, that
24 they were working in their capacity as New York State
25 employees at the time of the incident. Therefore, this

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1 element has been satisfied.

2 Second element: In the context of an
3 excessive force claim, the key inquiry is whether the
4 defendant applied force in a good faith effort to
5 maintain or restore discipline or whether the defendant
6 acted maliciously and sadistically for the very purpose
7 of causing harm.

8 An act is maliciously done if it is done to
9 cause pain or injury to another without justification.
10 An act is done sadistically if it is done to obtain
11 gratification by the infliction of physical or mental
12 pain to another.

13 Your evaluation of this element involves an
14 evaluation of the force used, that is, was the force
15 reasonable in light of the circumstances of the case.
16 In deciding this, you should examine the facts, such as
17 the extent of the plaintiff's injuries, the need for the
18 application of force, the relationship between that need
19 and the amount of force used, the threat reasonably
20 perceived by the defendant you are considering, and any
21 effort by the defendant you are considering to temper
22 the severity of a forceful response. For example, to
23 use only that force necessary to meet the threat posed.

24 Again, in the context of a prison, it's
25 necessary to realize that not every push or shove

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1 violates a prisoner's constitutional rights. It's
2 important to remember that a corrections officer is
3 permitted by law to use such physical force as may have
4 been reasonably necessary to enforce compliance with
5 proper instructions and to protect other prisoners,
6 themselves and other correction staff from physical
7 harm.

8 If in evaluating these factors leads you to
9 believe that the defendant you are considering acted
10 maliciously and sadistically for the very purpose of
11 causing harm, then plaintiff has established this
12 element as to that defendant.

13 If, however, you find that the defendant you
14 are considering acted in good faith in order to maintain
15 and restore discipline, then the plaintiff has failed to
16 meet this element as to the defendant you are
17 considering.

18 The third element is injury caused by the
19 defendant. If you find that the defendant you are
20 considering used force in a malicious and sadistic
21 manner, then you must consider whether such conduct was
22 the proximate cause of an injury to the plaintiff. In
23 an excessive force claim, this element may be
24 established even if the victim does not suffer serious
25 or significant injury so long as he has suffered some

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1 injury.

2 A proximate cause is an act or omission that,
3 in a natural course, produces injury and without this
4 act or omission, the injury would not have occurred.
5 Stated another way, before plaintiff can recover damages
6 for any injury, he must first show by a preponderance of
7 the evidence that such injury would not have come about
8 were it not for the conduct of the defendant you are
9 considering.

10 In addition to the excessive force claim I
11 just described to you, plaintiff also alleges that
12 Defendant Barnaby failed to protect him from excessive
13 force inflicted upon him by Defendant McGrath. It is
14 important to note that you are only to reach the merits
15 of this claim if you find that Defendant McGrath used
16 excessive force against the plaintiff.

17 Under the Eighth Amendment, a corrections
18 officer may not, with deliberate indifference, fail to
19 intervene to protect the constitutional rights of a
20 prisoner from infringement by another corrections
21 officer in his presence.

22 To prove his failure-to-protect claim,
23 plaintiff must prove each of the following elements
24 beyond a reasonable doubt as to the failure to intervene
25 against Defendant Barnaby. First, the parties agree

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1 that the defendants were acting under color of state law
2 and that they were working in their capacity as New York
3 State employees at the time of this incident.

4 Therefore, the first element has been established.

5 Second, plaintiff must prove by a
6 preponderance of the evidence that the defendant used
7 excessive force against him during the incident alleged.
8 In other words, before considering plaintiff's
9 failure-to-protect claim, you must have found that
10 Defendant McGrath used excessive force against the
11 plaintiff.

12 Third, the defendant was deliberately
13 indifferent with excessive force being used against
14 plaintiff by another corrections officer. To satisfy
15 this claim, plaintiff must prove by a preponderance of
16 the evidence that Defendant Barnaby was deliberately
17 indifferent to the excessive use of force being used
18 against plaintiff by Defendant McGrath.

19 Deliberate indifference is established only if
20 that defendant had actual knowledge that another
21 defendant was using excessive force against the
22 plaintiff and disregarded that risk by intentionally
23 refusing or failing to take reasonable measures to stop
24 the use of excessive force. Mere inattention or
25 inadvertence does not constitute deliberate

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1 indifference.

2 Fourth, that the defendant had a realistic
3 opportunity to intervene and prevent harm. In addition
4 to proving that the defendant was deliberately
5 indifferent to plaintiff's safety, plaintiff must also
6 prove that the defendant had a realistic opportunity to
7 intervene and prevent harm from occurring. Therefore,
8 you must find by a preponderance of the evidence that
9 Defendant Barnaby had sufficient time to intervene and
10 that had he intervened, he would have been capable of
11 preventing harm to plaintiff caused by the use of
12 excessive force.

13 Fifth, if you find that Defendant Barnaby
14 failed to protect plaintiff from the use of excessive
15 force, you may only find him responsible for the damages
16 that he would have been able to prevent. As I stated
17 earlier, a proximate cause is an act or omission that in
18 a natural course produces injury and without this act or
19 omission, the injury would not have occurred. Stated
20 another way, before plaintiff can recover damages for
21 any injuries, he must first show by a preponderance of
22 the evidence that such injury would not have come about
23 were it not for the conduct of the Defendant Barnaby.

24 I'm now going to charge you on the law of
25 damages. If plaintiff has proven by a preponderance of

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1 the credible evidence that a defendant is liable on any
2 of his claims, then you must determine the amount of
3 damage to which plaintiff is entitled for this claim.
4 However, you should not infer that the plaintiff is
5 entitled to recover damages simply because I'm
6 instructing you on the elements of damages.

7 It is exclusively your function to decide the
8 issues of liability as I've outlined, and I'm
9 instructing you on damages only so that have guidance
10 should you decide the plaintiff is entitled to recover.

11 Compensatory damages. The purpose of the law
12 of damages is to award, as far as possible, just and
13 fair compensation for the loss, if any, resulting from a
14 defendant's violation of plaintiff's rights. If you
15 find that a defendant is liable on one or more of the
16 plaintiff's claims as I've explained them to you, then
17 you must award plaintiff sufficient damages to
18 compensate him for any injuries proximately caused by
19 that defendant's conduct.

20 An injury or damage is proximately caused by
21 an act or failure to act whenever it appears from the
22 evidence in the case that the act or omission was a
23 substantial contributing factor in causing the injury or
24 damage. These are known as compensatory damages.

25 Compensatory damages seek to make the

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1 plaintiff whole. That is, compensate him for any damage
2 he may have suffered. A prevailing plaintiff is
3 entitled to compensatory damages for the physical
4 injury, pain and suffering, mental anguish, shock and
5 discomfort that he has suffered because of the
6 defendant's conduct. You are to use your sound
7 discretion in fixing an award of damages, drawing
8 reasonable inferences where you deem appropriate from
9 the facts and circumstances in the case.

10 Now I'm going to talk to you about nominal
11 damages. If you find that the plaintiff has failed to
12 prove that he is entitled to compensatory damages, you
13 must nevertheless award him nominal damages in the
14 amount of one dollar if you find that the defendant you
15 are considering violated his Eighth Amendment rights.
16 You may not award the plaintiff both nominal and
17 compensatory damages if you find that the defendant you
18 are considering violated his rights. In other words, if
19 you find that the defendant you are considering violated
20 the plaintiff's rights and the plaintiff was measurably
21 injured, you may award him compensatory damages.

22 On the other hand, if you find that the
23 defendant you are considering violated plaintiff's
24 rights but that the plaintiff was not measurably
25 injured, you must award him nominal damages. If you

1 find that plaintiff's constitutional rights were
2 violated and award nominal damages, you may also
3 consider whether the plaintiff is entitled to an award
4 of punitive damages.

5 You may consider the issue of punitive damages
6 whether or not you award plaintiff any compensatory
7 damages on his Constitutional claims.

8 Punitive damages are awarded in the discretion
9 of a jury to punish a defendant for extreme or
10 outrageous conduct or to deter or prevent a defendant
11 and others like him from committing similar acts in the
12 future.

13 I must emphasize, however, that at this stage
14 of the proceeding, you are only to consider whether or
15 not the plaintiff is entitled to such an award of
16 punitive damages against one or more of the defendants.

17 If you determine that plaintiff is entitled to
18 such an award, you will be asked to determine what
19 amount such an award should be at a separate hearing
20 concerning the issue. Therefore, you are not to
21 consider the amount of punitive damages if any you
22 believe the plaintiff is entitled to.

23 You may conclude that plaintiff is entitled to
24 punitive damages if you find that one or more of the
25 defendants' acts or omissions were done maliciously or

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1 wantonly. An act is maliciously done if it is prompted
2 by ill will or spite toward the injured person.

3 An act is wanton if it is reckless or in
4 callous disregard of or different to the rights of the
5 injured person.

6 In order to justify an award of punitive
7 damages, plaintiff has the burden of proving by a
8 preponderance of the evidence that the defendant you are
9 considering acted maliciously or wantonly with regard to
10 his rights.

11 Please remember that, again, at this stage of
12 the proceeding, you are only to consider whether or not
13 the plaintiff is entitled to such an award of punitive
14 damages. If you determine that the plaintiff is so
15 entitled, a separate hearing will be held at which you
16 will hear evidence relevant to the proper amount of such
17 damages.

18 While many of the same considerations apply to
19 a determination of the amount of punitive damages, the
20 Court will have specific instructions for you regarding
21 this determination should it become necessary.

22 I'm now going to have the jury verdict
23 sheet -- would you display it? That's great.

24 I have prepared a jury verdict form to help
25 you get through your deliberations. You will see the

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1 name of our court, the name of the case. To the right
2 are my initials and the initials of our magistrate judge
3 and the file number of the case. It's very important
4 that once you have reached a verdict, the foreperson
5 signs this verdict form and return that to the
6 courtroom. So even though all of you will have a copy
7 of this, only one verdict form gets returned, signed by
8 the foreperson.

9 If you look at question 1-A, above that it
10 says, please carefully follow the bold type instructions
11 accompanying each question, and that's really important
12 because after each question, we have very explicit
13 instructions for you to help you.

14 Question 1-A: Did the plaintiff prove by a
15 fair preponderance of the credible evidence that on
16 January 28th, 2016, any of the defendants used excessive
17 force against him, in violation of the Eighth Amendment
18 of the United States Constitution, and you would
19 consider each defendant separately. You will answer yes
20 or no for Defendant Justin McGrath or yes or no for
21 Defendant Matthew Barnaby and carefully follow those
22 boldface instructions which indicate if you answered no
23 with respect to all defendants in question 1-A, your
24 deliberations are complete and then the foreperson
25 should sign the form and give it to the security

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1 officer.

2 If you answered yes with respect to any of the
3 defendants in question 1-A, proceed to question 1-B as
4 to any such defendants. So if you turn the page, you
5 see question 1-B. Did plaintiff prove by a fair
6 preponderance of the credible evidence that the use of
7 excessive force on January 28th, 2016, by any defendants
8 proximately caused an injury to the plaintiff, you will
9 answer that yes or no. Follow the boldface
10 instructions.

11 If you answered yes, you go to question 1-C,
12 and that question asks: What sum of money do you find
13 plaintiff has proven by a fair preponderance of the
14 evidence would fairly compensate him for any injuries he
15 has suffered that were caused by the defendant you are
16 considering, and then you will fill in that amount.

17 Now, as I've said to you in the charge, if you
18 find that the plaintiff was injured and you have found
19 that one or more defendant violated his constitutional
20 rights, you will award compensatory damages if you find
21 he was measurably injured. If you find that there was
22 constitutional violation but there are no measurable
23 injuries, then you must award him nominal damages in the
24 amount of one dollar.

25 So it's not both and it's entirely up to you

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1 in terms of whether you will award damages, what
2 defendants if any you will award damages against, and
3 whether or not it's nominal or compensatory. It's all
4 up to you and nothing that I'm reading on this verdict
5 form should suggest what you should do.

6 If you look at question 1-D, if you get to
7 that question and, again, that's entirely up to you,
8 actually, I've already gone over 1-D, which is
9 compensatory damages.

10 If you have found that -- let me restate that.
11 If you get to the question of punitive damages which is
12 1-E, you will fill that out but, again, it will be
13 entirely up to you as to whether or not the plaintiff
14 met his burden for the award of punitive damages.
15 That's question 1-E.

16 Question 2-A is the claim against Officer
17 Barnaby. Did plaintiff prove by a fair preponderance of
18 the credible evidence that the following defendant
19 violated his Eighth Amendment rights by failing to
20 protect him from the use of excessive force, you will
21 answer that yes or no, and then the questionnaire
22 follows what I just went through with the other officer
23 on the excessive force claim. So you decide what
24 questions to answer.

25 If you carefully follow the boldface

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1 instructions, it's a road map for you, which is why we
2 give it to you. It's to assist you in your
3 deliberations and, remember, if you do get to the
4 punitive damages question, you're only deciding a yes or
5 no on that. You're not filling in any amount and,
6 again, it's entirely up to you as to how many questions
7 you will answer on this verdict sheet and what your
8 answers will be.

9 And just to emphasize again, only one verdict
10 sheet signed by the foreperson should come back, that
11 will be given to my courtroom deputy, and that's how we
12 will announce the verdict.

13 I have now outlined the rules of law
14 applicable to this case and the processes by which you
15 should weigh the evidence and determine the facts. In
16 just a few minutes, you will retire to the jury room for
17 your deliberations. Your first order of business in
18 that jury room will be to elect a foreperson. The
19 foreperson's responsibility is to ensure that
20 deliberations proceed in an orderly manner. This does
21 not mean that the foreperson's vote is entitled to any
22 greater weight than the vote of any other juror.

23 When you are in the jury room, listen to each
24 other and discuss the evidence and the issues. It's
25 your duty, each of you as jurors, to consult with one

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1 another. You must deliberate with a view to reaching an
2 agreement but only if you can do so without violating
3 your individual judgment and conscience.

4 Your job as jurors is to reach a fair
5 conclusion from the law and the evidence. The parties
6 and the Court are relying on you to give full and
7 conscientious consideration to the issue and the
8 evidence before you.

9 In order to return a verdict, it is necessary
10 that each juror agree. Your verdict must be unanimous.
11 If in the course of your deliberations your
12 recollections on any part of the testimony should fail
13 or if you find yourself in doubt concerning these
14 instructions, it's your privilege to return to the
15 courtroom to have the testimony read back or to have my
16 instructions further explained.

17 I caution you, however, that the readback of
18 testimony may take some time and effort. You should
19 therefore make a conscientious effort to resolve any
20 questions as to the testimony through your collective
21 recollections. Should you desire to communicate with
22 the Court during your deliberations, please have your
23 foreperson put a message or a question in writing. The
24 foreperson should sign the note and pass it to the court
25 security officer who will bring it to my attention. I

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1 will then respond, either in writing or orally, by
2 having all of you return to the courtroom.

3 During your deliberations, do not hesitate to
4 re-examine your views and change your mind. Do not,
5 however, surrender your honest convictions because of
6 the opinion of a fellow juror or for the purpose of
7 returning a verdict. Remember, you are not the
8 partizans, you are the judges, the judges of the facts.
9 Your duty is to seek the truth from the evidence
10 presented to you while holding the parties to their
11 burden of proof.

12 Once you have reached a unanimous verdict,
13 your foreperson should fill in the verdict form, date
14 and sign it, and inform the court security officer that
15 you have reached a verdict.

16 After the Court has received your verdict, you
17 may be asked some additional questions. Are there any
18 issues from the plaintiff's perspective in terms of the
19 oral presentation of the charge?

20 MR. ROCHE: No, your Honor.

21 THE COURT: How about from Defendant McGrath?

22 MR. BLENK: No, your Honor.

23 THE COURT: From Defendant Barnaby?

24 MR. ABEL: No, your Honor.

25 THE COURT: Members of the jury, it's 10 of 5

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1 and I know that you have been here since quite early
2 this morning.

3 So this is my plan. I'm going to ask you to
4 be back here tomorrow morning at 9:00 A.M. This evening
5 you should not be discussing this case with anyone.
6 Don't exchange phone numbers for the purpose of
7 discussing the case. You have to deliberate all
8 together all the time. So I think that due to the
9 lateness of the day, the best thing, as I said, to have
10 you report at 9:00 A.M.

11 We will have all of the evidence in the
12 courtroom for you. You can't deliberate until everybody
13 is together. If someone leaves the room to use a
14 restroom or to have a cigarette -- I don't know if any
15 of you are smokers -- the deliberations have to stop
16 until everybody is together.

17 Your first job tomorrow morning will be to
18 select a foreperson. Okay? After you select a
19 foreperson, you can begin your deliberations. I want
20 you to know that tomorrow is a bit of a different day in
21 that when you go into the jury room, your mobile devices
22 will be collected. You cannot have them in the jury
23 room with you while you are deliberating.

24 Also, please make sure you pack a lunch and
25 snacks because while you are deliberating, you will not

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1 be going outside to get lunch. Now, ordinarily we order
2 lunch for jurors but because of COVID restrictions, we
3 are not able to do that. So, pack your lunch, pack your
4 beverages, pack your snacks.

5 I am going to have our alternate juror come
6 back tomorrow; however, Britney is going to bring you
7 into a separate room. You will not be deliberating with
8 the eight. However, I am going to have you remain just
9 in the event that something were to happen to one of our
10 eight jurors. Okay?

11 So, before I excuse you, Britney, did you want
12 to say something?

13 (Pause in proceeding)

14 THE COURT: Before I send the jury home for
15 the evening, is there anything that the plaintiff needs
16 to put on the record?

17 MR. ROCHE: No, your Honor.

18 THE COURT: Anything Defendant McGrath needs
19 to put on the record?

20 MR. BLENK: No, your Honor.

21 THE COURT: Defendant Barnaby?

22 MR. ABEL: No, your Honor.

23 THE COURT: Britney, do you want to swear in
24 our court officer please.

25 COURT CLERK: Please state your name for the

1 record.

2 COURT OFFICER: Joseph F. Graziane.

3 (Court officer sworn)

4 THE COURT: Remember, folks, no discussion of
5 this case amongst yourselves, no discussion with anyone
6 else, don't do any research about this case. Tomorrow
7 morning when you are all together you will begin your
8 discussions on the case and not before.

9 Have a good night. We will see you tomorrow
10 morning at 9 A.M.

11 (Jurors excused)

12 THE COURT: Britney is just making sure that
13 the jurors are taken care of right now but she will be
14 in in a minute. I want to make sure that she has your
15 mobile phone numbers. Now, I'm not saying that you have
16 to be physically present in the courthouse at 9:00 A.M.,
17 but you need to be at least ten minutes away for us so
18 that if we need you, we can get you.

19 I always ask attorneys to give their mobile
20 numbers and they do, but then sometimes when we call,
21 you don't answer them. If you get a call, you need to
22 answer. It's not unusual at all for us to get early
23 questions or early requests for readback. So just make
24 sure that you can get over here in about ten minutes.

25 And I will say that -- and I want this to be

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1 on the record -- that all counsel, really, you all knew
2 this case forward and backward and it resulted in a
3 great economy of time and resources. Although not all
4 of the evidence was stipulated to, it ended up that much
5 of it was and, in my view, you did your clients a great
6 service because if there's anything that will drive a
7 jury up a wall, it's hours of fighting about evidence
8 and so you did a service, and I certainly am grateful to
9 counsel for the way that the case was put in. It was
10 put in very well.

11 I think that looking at what both sides did,
12 the witnesses that were necessary were called, the ones
13 that weren't were not called, but the bottom line is
14 that it was a well-tried case and I say this now because
15 after a verdict comes in, no one really hears this
16 because someone will leave here quite content and others
17 will leave less content and off the record for a moment.

18 (Discussion held off the record)

19 (Case adjourned until August 21, 2020)

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21 * * * * *

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1 (Proceeding held on August 21, 2020)

2 (Held out of presence of jury.)

3 THE COURT: The record should reflect that I
4 am in open court with counsel and the clients; the jury
5 is not present.

6 At 12:35 I received a note from our foreperson
7 as follows: In regards to question to 1-C, should we be
8 considering plaintiff's time in solitary to be included
9 as injury he has suffered that was proximately caused by
10 defendants' alleged use of excessive force? Also,
11 clarification on the term surrounding the date of
12 1/28/16.

13 Let me deal with the latter portion of that
14 question. If you look at question 1-C of the verdict
15 sheet, it states: What sum of money, in any, do you
16 find that plaintiff has proven by a fair ponderance of
17 the evidence would fairly compensate him for any injury
18 he has suffered that was proximately caused by
19 defendants' alleged use of excessive force surrounding
20 the January 28th, 2016, incident.

21 I'm going to tell the members of the jury that
22 the word "surrounding" simply means on or about.

23 Is there any objection to that from the
24 plaintiff?

25 MR. ROCHE: No, your Honor.

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1 THE COURT: Any objection from Defendant
2 McGrath?

3 MR. MIRANDA: No, your Honor.

4 THE COURT: Any objection from Defendant
5 Barnaby?

6 MR. ABEL: No, your Honor.

7 THE COURT: On the first question, what is the
8 plaintiff's position?

9 MR. ROCHE: Your Honor, I would submit that
10 the solitary confinement should be part of the damages
11 calculation. It followed directly from the incident and
12 filing the false misbehavior report following the
13 incident. So it's damages that flows directly from the
14 violation of his rights, and so it should be considered
15 by the jury as damages.

16 THE COURT: What is the position of
17 Defendant McGrath?

18 MR. MIRANDA: Your Honor, we would submit that
19 it should not be included. In plaintiff's amended
20 complaint they had a Fourteenth Amendment claim that
21 related to, I think, certain deprivations of due process
22 that I think more appropriate cover some issue relating
23 to SHU time. I think that question was -- pertains more
24 to the bodily harm that the plaintiff alleged -- alleges
25 that he suffered.

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1 THE COURT: And Defendant Barnaby, what's your
2 position?

3 MR. ABEL: We would have the same position as
4 that that was just advanced by Attorney Miranda.

5 THE COURT: I'm doing a little research but
6 here's the thing. The due process claim was dismissed,
7 and I don't really want to try this case twice and the
8 thing is that when you look at the claims that remain,
9 excessive force and failure to intervene and you look at
10 the misbehavior report, at first review to me, they
11 don't seem to be related, and if there was a due process
12 claim, I could see very easily why I could answer that
13 question in the affirmative but I'm not certain I can.

14 I'm going to take 10 or 15 minutes to do a
15 little research. If any of you come up with any case
16 law while I'm looking, feel free to give it to me but
17 I'm inclined to -- I mean, there are a couple of things
18 that I can do. Instead of just saying no, I could say
19 that you could -- you must award damages proximately
20 caused by the claims and these are the claims:
21 excessive force and failure to intervene, and trust
22 the good sense of the jury because I think that they are
23 thinking the same thing that I just heard in this
24 courtroom. How can the fact that, you know, he was put
25 in a SHU relate to excessive force, especially if they

1 have looked at the misbehavior report, which I have
2 looked at.

3 So let me just do a little research. I will
4 let you know precisely what I'm going to say before I
5 say it, and obviously if you have an exception to it,
6 you can put it on the record.

7 I'd like to be as correct as I can on this
8 because it's important, and I want to see if I can find
9 any case law. Again, if you find any case law on it,
10 just let Britney know and I will take a look at it.
11 Thank you.

12 MR. ROCHE: Thank you, your Honor.

13 (Pause in proceeding)

14 THE COURT: Record should reflect that we are
15 in open court, outside the presence of the jury.

16 With respect to the jurors' questions
17 regarding whether they can consider the time that
18 plaintiff spent in SHU as an item of damages, I've given
19 all counsel a copy of a case entitled *Greenburger versus*
20 *Roundtree*, 2020 WL 4746460.

21 In reviewing that case, it seems clear to me
22 that that case is quite similar to the case that I'm
23 trying and the difference between that case and this
24 case is that there was a pending claim for a violation
25 of due process, and particularly there's language in

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1 that case, on page 3, as follows: As to Greenburger's
2 due process claim based on the time he spent in solitary
3 confinement, Judge Kay found that the viability of this
4 claim hinges on whether Greenburger's allegations
5 established that he possessed a protected liberty
6 interest.

7 The only issues in this case are excessive
8 force and failure to intervene. The Second Circuit has
9 held that damages recoverable for loss of liberty for
10 the period spent in wrongful confinement are separable
11 from damages recoverable for such injuries as physical
12 harm, embarrassment, and emotional suffering from
13 *Kerman versus City of New York*, 374 F.3d 93, that's
14 Second Circuit 2004. Initially in the amended complaint
15 there was claim number two under the Fourteenth
16 Amendment; however, and I'm marking as Court Exhibit
17 number one --

18 COURT CLERK: Judge, that would be number two.
19 I'm sorry.

20 THE COURT: Court Exhibit number 2, a letter
21 dated March 23rd, 2020, from plaintiff's counsel
22 indicating that there's no opposition to dismissing that
23 second claim and the claim was dismissed.

24 In light of my review of the cases, Second
25 Circuit precedent, the second amended -- pardon me --

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1 the amended complaint and the letter that I marked as
2 Court Exhibit 2, I am going to instruct the jurors as
3 follows:

4 In this case, there are two claims remaining,
5 excessive force as to the Defendants McGrath and
6 Barnaby, and failure to intervene as to Defendant
7 Barnaby. As I previously instructed you, the prevailing
8 plaintiff is entitled to compensatory damages for the
9 physical injury, pain and suffering, mental anguish,
10 shock and discomfort that he has suffered because of the
11 defendants' conduct.

12 Because there is no claim specific to the
13 plaintiff's time spent in the special housing unit, you
14 should not consider that time when determining an
15 amount, if any, of compensatory damages that plaintiff
16 is entitled to. Rather, an award of compensatory
17 damages must be determined only when considering the
18 physical injury, pain and suffering, mental anguish,
19 shock and discomfort that plaintiff suffered as a result
20 of the alleged use of excessive force.

21 Does counsel for the plaintiff want to respond
22 in any way?

23 MR. ROCHE: Yes, your Honor. I have read the
24 case that you provided, the *Roundtree* case, and I would
25 submit that it doesn't address a question of -- the

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1 question of causal connection between an Eighth
2 Amendment violation and the damages from time in
3 solitary confinement. It said that -- it just addresses
4 the fact that it was -- that such damages would be
5 allowed under Fourteenth Amendment claim but didn't say
6 that it could not be considered on an Eighth Amendment
7 claim.

8 So I would submit that just in the context of
9 the facts of this case, where a corrections officer
10 assaults an inmate and in the course of the same
11 incident alleges that the inmate had assaulted the
12 officer and had planted a weapon on him. It's entirely
13 foreseeable for the corrections officer and that this
14 inmate would suffer consequences such as time, you know,
15 a lot of time in SHU. It's actually an inevitability
16 for such a circumstance and the corrections officer
17 should totally -- should totally know that.

18 So it is foreseeable and because of that,
19 should be considered proximate cause of the incident
20 that's alleged in this case.

21 THE COURT: I understand your argument but
22 excessive force in this case is not what landed the
23 plaintiff in the special housing unit, and I do think it
24 goes to a due process liberty claim. So I note your
25 exception.

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1 Is there anything that the defense for McGrath
2 wants to put on the record about that?

3 MR. MIRANDA: Your Honor, we would just agree
4 that the case presented as Court Exhibit 2 factually is
5 analogous to the current situation, that there is no
6 pending Fourteenth Amendment claim, and that law in the
7 Second Circuit is such that time spent in SHU should not
8 be considered for damages, if any, that the jury may
9 award.

10 THE COURT: All right. Defendant Barnaby?

11 MR. ABEL: No. Once again, we will join with
12 the same points made just the now by Attorney Miranda.

13 THE COURT: All right. And I will also tell
14 the jurors that that word "surrounding" in question 1-C
15 simply means on or about.

16 MR. ROCHE: Your Honor, if I may, I would just
17 ask that an instruction be given to the jury that even
18 though you are instructing them that they can't consider
19 the SHU time in the compensatory damages, that it is
20 something that could be considered for punitive damages.

21 THE COURT: The time in SHU?

22 MR. ROCHE: Yes.

23 THE COURT: I don't think it flows that it
24 can.

25 MR. ROCHE: It goes to the conduct of the

1 officers. It's entirely foreseeable for them. They
2 know that if -- if they assault an inmate and claim that
3 the inmate had, in fact, assaulted them, they know that
4 the person -- the inmate is going to do time in SHU. So
5 I would submit that's entirely appropriate that they
6 should be subject to punishment for that because it's
7 all inextricably interlinked and it -- it's -- they
8 know -- they're intentionally causing not just the
9 physical and emotional injuries to the inmate, but also
10 the confinement to SHU for an extensive period of time.

11 THE COURT: I think that would render me an
12 inconsistent verdict. So I'm going to note your
13 exception but I am not going to charge that they can
14 consider SHU for punitive damages.

15 Just for clarification, I didn't mark the case
16 as a Court exhibit. I marked a letter dated March 23rd,
17 2020, as Court Exhibit 2. Let's get the jury, please.

18 (Jurors enter courtroom, 1:38 P.M.)

19 THE COURT: The record should reflect that we
20 are in open court. The jury is present and accounted
21 for, all counsel and litigants are also present.

22 I received a note from our foreperson at
23 approximately 12:35 P.M., which has been marked as Court
24 Exhibit 1, it's states as follows:

25 In regards to question 1-C, should we

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1 considering plaintiff's time in solitary to be included
2 as injury he has suffered that was proximately caused by
3 defendants' alleged use of excessive force. Also,
4 clarification on term "surrounding" the date of 1/28/16.

5 Let me begin with the latter portion of that
6 question. Question 1-C says: What sum of money, if
7 any, do you find that plaintiff has proven by a fair
8 preponderance of the evidence would fairly compensate
9 him for any injury he has suffered that was proximately
10 caused by defendant or defendants' alleged use of
11 excessive force surrounding the January 28th, 2016,
12 incident?

13 By the word "surrounding," the Court meant on
14 or about. That's all. On or about January 28th.

15 With respect to the remainder of the question,
16 in this case, there are two claims remaining: excessive
17 force as to Defendants McGrath and Barnaby, and failure
18 to intervene as to Defendant Barnaby.

19 As I previously instructed you, a prevailing
20 plaintiff is entitled to compensatory damages for the
21 physical injury, pain and suffering, mental anguish,
22 shock and discomfort that he has suffered because of the
23 defendants' conduct. Because there is no claims
24 specific to the plaintiff's time spent in the special
25 housing unit, you should not consider that when

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1 determining the amount, if any, of compensatory damages
2 that plaintiff is entitled to.

3 Rather, any award of compensatory damages must
4 be determined only by considering the physical injury,
5 pain and suffering, mental anguish, shock and discomfort
6 that plaintiff suffered as a result of the alleged use
7 of excessive force.

8 Would anyone like me to repeat that? Okay.
9 Thank you, members of the jury. You may return to the
10 jury room and continue your deliberations.

11 (Jurors excused, 1:42 P.M.)

12 (Return to courtroom, 2:25 P.M.)

13 THE COURT: The record should reflect that we
14 are in open court, outside the presence of the jury, and
15 that I received a note from our foreperson at 2:00 P.M.
16 dated today's date, August 21st, it's been marked as
17 jury note number 2 and the note says: We have reached a
18 verdict.

19 Britney, could we get the jury, please.

20 (Jurors enter courtroom)

21 THE COURT: Record should reflect that I have
22 received a note from our jury foreperson at 2:00 P.M.
23 for today's date. That note has been marketed as Jury
24 Note Number 2 and the note says: We have reached a
25 verdict. The jury is present and accounted for, all

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1 counsel and parties are present.

2 Before I have the verdict announced, I just
3 want to say to the jurors and to our alternate juror who
4 is here that I know how difficult it is to be a juror in
5 everyday life. I, myself, have been called for jury
6 duty but to be a juror when we're operating under COVID
7 precautions is really something else.

8 Honestly, when we planned to try this case, I
9 wasn't sure how many jurors would answer the call, and I
10 thought that many jurors would say, no, we're not
11 coming, you know, we have great concerns and, you know,
12 as a court we try to do everything that we could to keep
13 everyone safe. Your service has been extraordinary, in
14 my view, and as I said on day one, without people like
15 you, we have no justice system. You've seen it play out
16 now. Two sides, actually tree sides, very different
17 views, very different positions and we put the case in
18 your hands.

19 Without you, no trial, no justice system, and
20 after I discharge you from your service, I'm just going
21 to ask you to stay in the jury room for five minutes so
22 I can come in and thank you personally, and I will do
23 that, but on behalf of everyone associated with the
24 Northern District of New York, I can't thank you enough
25 for serving. Britney, would you get verdict sheet for

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1 me, please.

2 (Pause in proceeding)

3 THE COURT: Britney, would you please take the
4 verdict.

5 COURT CLERK: Yes, Judge. Would the
6 foreperson of the jury please stand.

7 As I read each question, please indicate the
8 jury's answer to the question. In the case of
9 Joseph Tranchina versus CO Justin McGrath, Bare Hill
10 Correctional Facility, formerly known as Jeremy McGrath,
11 and Sergeant Matthew Barnaby, Bare Hill Correctional
12 Facility, also known as John Barnaby, case number
13 17-cv-1256.

14 Question 1-A: Did plaintiff prove by a fair
15 preponderance of the credible evidence that on
16 January 28th, 2016, any of the defendants used excessive
17 force against him, in violation of the Eighth Amendment
18 of the United States Constitution? As to Defendant
19 McGrath, how do you find?

20 JUROR: Yes.

21 COURT CLERK: Was this answer unanimous?

22 JUROR: Yes.

23 COURT CLERK: As to Defendant Matthew Barnaby,
24 how do you find?

25 JUROR: No.

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1 COURT CLERK: Was this answer unanimous?

2 JUROR: Yes.

3 COURT CLERK: Question 1-B, did plaintiff
4 prove by a fair preponderance of the credible evidence
5 that the use of excessive force on January 28th, 2016,
6 by any defendants proximately caused an injury to the
7 plaintiff? As to Defendant Jeremy McGrath, how do you
8 find?

9 JUROR: Yes.

10 COURT CLERK: Was this answer unanimous?

11 JUROR: Yes.

12 COURT CLERK: As to defendant -- question 1-C,
13 what sum of money, if any, do you find that plaintiff
14 has proven by a fair preponderance of the evidence would
15 fairly compensate him for any injury he has suffered
16 that was proximately caused by defendants' alleged use
17 of excessive force surrounding the January 28th, 2016,
18 incident? As to Defendant Jeremy McGrath, how do you
19 find?

20 JUROR: \$190,000.

21 COURT CLERK: Was this answer unanimous?

22 JUROR: Yes.

23 THE COURT: Go on to the excessive force
24 claim.

25 COURT CLERK: Okay.

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1 THE COURT: And failure to intervene.

2 COURT CLERK: 1-E, did plaintiff establish by
3 a fair preponderance of the evidence that the defendant
4 for whom you answered yes to both questions 1-A and 1-B
5 was motivated by evil motive or intent or by reckless
6 indifference to plaintiff's constitutional rights such
7 that punitive damages should be assessed against the
8 defendant? As to Defendant McGrath, how do you find?

9 JUROR: Yes.

10 COURT CLERK: Was this answer unanimous?

11 JUROR: Yes.

12 COURT CLERK: Question 2-A, did plaintiff
13 prove by a fair preponderance of the credible evidence
14 that the following defendant violated his Eighth
15 Amendment rights by failing to protect him from the use
16 of excessive force on January 28th, 2016? As to
17 Defendant Matthew Barnaby, how do you find?

18 JUROR: No.

19 COURT CLERK: Was this answer unanimous?

20 JUROR: Yes.

21 COURT CLERK: Thank you.

22 THE COURT: Britney, would you get that
23 verdict sheet, please.

24 Members of the jury, before I thank you again,
25 let me ask, does either side request that the jury be

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1 polled?

2 MR. ROCHE: No, your Honor.

3 MR. BLENK: No, your Honor.

4 MR. ABEL: No, your Honor.

5 THE COURT: All right. Members of the jury, I
6 want to thank you again. Your services on this portion
7 of the trial are concluded, and on the liability portion
8 of the case, you are discharged as jurors; however, at
9 some point in the future, at least a month away, there
10 is going to be a hearing on the amount of punitive
11 damages that should be awarded. That's a separate
12 proceeding from this proceeding and my courtroom deputy
13 will get your contact information. That's not something
14 that's going to happen right away, and we will give you
15 advanced notice of a hearing in order for you to assess
16 what you consider to be the appropriate amount of
17 punitive damages.

18 So if you would just kindly go to the jury
19 room just for a few minutes and I'll be right in to
20 thank you personally.

21 (Jurors excused)

22 THE COURT: Be seated, please. Pursuant to
23 Rule 50(b) of the Federal Rules of Civil Procedure, a
24 renewed motion for judgment as a matter of law must be
25 filed no later than 28 days after entry of judgment.

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1 Pursuant to Rule 59(b) of the Federal Rules of
2 Civil Procedure, a motion for a new trial must be served
3 no later than 28 days after entry of judgment.

4 Pursuant to Appellate Rule 4 of the Federal
5 Rules of Appellate Procedure, the notice of appeal must
6 be filed with the district clerk within 30 days after
7 the entry of judgment appealed from and post-judgment
8 interest will run from the date that judgment is
9 entered.

10 Counsel, my office will be in touch in terms
11 of scheduling a hearing on punitive damages. It isn't
12 something that I'm going to do immediately. We will
13 propose some dates. We will ascertain if those dates
14 work for you, we will be in contact with the jury, and
15 we will proceed in that fashion.

16 [Juror 01-0070], thank you again so much for
17 your participation. It's not uncommon that we will lose
18 a juror under ordinary circumstances but we were
19 fortunate enough not to lose a juror, and I thank you
20 for being willing to serve, especially as an alternate,
21 and you're certainly free to leave at any time that you
22 would like to.

23 Is there anything further from plaintiff's
24 counsel at this time?

25 MR. ROCHE: No, your Honor.

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1 THE COURT: Is there anything further from
2 Defendant McGrath?

3 MR. MIRANDA: No, your Honor.

4 THE COURT: Anything further from Defendant
5 Barnaby?

6 MR. ABEL: No, your Honor.

7 THE COURT: Okay. Court stands adjourned.
8 Thank you.

9 (Proceeding concluded)

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C E R T I F I C A T I O N

I, Lisa L. Tennyson, RMR, CSR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

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